FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JANUARY 1, 1975 TO JUNE 30, 1975

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MEMBERS OF THE FEDERAL TRADE COMMISSION AS OF JULY 1, 1975

LEWIS A. ENGMAN, *Chairman.*[1]
Took oath of office February 20, 1973.
PAUL RAND DIXON.
Took oath of office March 21, 1961.
MAYO J. THOMPSON.[2]
Took oath of office July 2, 1973.
M. ELIZABETH HANFORD.
Took oath of office December 4, 1973.
STEPHEN NYE.
Took oath of office May 29, 1974.
CHARLES A. TOBIN, *Secretary.*
Appointed January 15, 1971.

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[1] Resigned December 31, 1975.
[2] Resigned September 1, 1975.

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

PETROLANE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2620. Complaint, Jan. 2, 1975 - Decision, Jan. 2, 1975

Consent order requiring a Long Beach, Calif., distributor of liquid petroleum gas (LP), among other things to notify customers prior to delivery of "increased price gas" that the price has increased; provide the customer with the applicable price schedule, and disclose that related information can be obtained from their district office.

Appearances

For the Commission: *David A. Middaugh.*

For the respondent: *William E. Linsenbard,* Long Beach, Calif.

COMPLAINT

The Federal Trade Commission, having reason to believe that Petrolane, Inc., a corporation (hereinafter respondent), has violated Section 5 of the Federal Trade Commission Act, and that a proceeding would be in the public interest, hereby issues its complaint:

PARAGRAPH 1. Respondent is a California corporation with its office located at P.O. Drawer 1410, 1600 E. Hill St., Long Beach, Calif.

PAR. 2. Respondent is a multinational company engaged in the business of, among other things, selling liquified petroleum gas (LP gas) in competition with other sellers of LP gas.

PAR. 3. Respondent ships, distributes and sells LP gas in interstate commerce to customers located in almost every state.

PAR. 4. Respondent sells LP gas to home owners and businesses, which use the gas for heating and other purposes. Such sales normally take place in the following manner. The customer and respondent contract that respondent will furnish the customer's LP gas needs. Respondent installs a storage tank and other related equipment on the customer's premises. Thereafter, respondent periodically makes deliveries of LP gas to the customer's storage tank. Respondent's deliveryman fills the tank and makes out the customer's bill, which states the number of gallons delivered and the total dollar amount charged. The bill is delivered to the customer, or, if the customer is not present, the bill is left at his premises. The customer may either pay his bill immediately or await receipt of a formal bill mailed by respondent.

PAR. 5. From time to time respondent raises the price per gallon of LP gas delivered to its customers. Respondent does not notify its customers of price increases prior to delivery of the LP gas subject to the increase. Respondent does not, simultaneously with delivery, give notice to customers that its price has increased. Respondent does not, subsequent to delivery of increased price gas, inform customers of the increase. The customer thus has no way to discover a price increase except by (1) dividing the number of gallons delivered into the total amount billed and comparing the resultant price per gallon with the price per gallon similarly computed from prior bills, or (2) going to respondent's district office where the prices are posted.

PAR. 6. Knowledge of a price increase may affect the customer's decision as to whether to continue purchasing LP gas from respondent.

PAR. 7. The above-described conduct injures respondent's customers and competitors. Customers pay increased prices under the belief that prices have not increased and are deprived of the opportunity to compare respondent's prices with those of respondent's competitors. Respondent's competitors are deprived of those of respondent's customers who may change their LP gas supplier because of respondent's higher prices.

PAR. 8. The above-described conduct constitutes an unfair or deceptive act or practice and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Proposed respondent Petrolane, Inc. is a California corporation with its office located at P.O. Drawer 1410, 1600 E. Hill St., Long Beach, Calif.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent, its successors and assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from delivering LP gas to any customer at a price higher than that charged by respondent to the customer for the immediately preceding delivery (or higher than the price to similar customers prior to the price increase, if there have been no prior deliveries to that customer) (hereinafter referred to as "increased price gas") unless:

1. Respondent has notified the customer prior to delivery of "increased price gas" that its price of LP gas has increased, has provided the customer with the applicable price schedule, and has disclosed that related information may be obtained by calling respondent's district office; *or*

2. (a) The bill left at the customer's premises by the deliveryman for "increased price gas" discloses on the front the number of gallons delivered, the price per gallon and the total price of the delivery; clearly and conspicuously states on the front: "Reflects price increase"; and contains a statement that the amount of the increase and related information may be obtained by calling respondent's district office; *and*

(b) All bills sent to customers, subsequent to the bill left by the deliveryman, clearly and conspicuously state: "The charges on this statement may include the effects of a price increase or decrease. For further information please refer to your field delivery invoice or call our district office."

It is further ordered, That respondent shall forthwith deliver a copy of this order to each of its employees and agents engaged directly or indirectly in the retail distribution of LP gas, and to each employee who becomes so engaged during a period of two years from the date this order becomes effective.

It is further ordered, That respondent shall maintain such records as will fully disclose the manner and form of its compliance with this order.

It is further ordered, That respondent notify the Commission at least thirty days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall, within sixty days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

REGAL APPAREL LTD.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-2621. Complaint, Jan. 2, 1975 - Decision, Jan. 2, 1975

Consent order requiring a Los Angeles, Calif., manufacturer and importer of men's and boys' apparel, among other things to cease misbranding its textile fiber products.

Appearances

For the Commission: *Gerald E. Wright* and *Kerper G. Propert.*
For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by such Acts, the Federal Trade Commission, having reason to believe that Regal Apparel Ltd., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the rules and regulations promulgated under the Textile Fiber Products Identification Act, and it now appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Regal Apparel Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Their office and principal place of business is located at 124 E. Olympic Blvd., Los Angeles, Calif.

Respondent is engaged in the manufacturing, importation and sale of mens and boys wearing apparel, including, but not limited to tennis jackets.

PAR. 2. Respondent is now and for some time last past has been engaged in the introduction, delivery for introduction, manufacture for introduction, sale, offering for sale in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States of textile fiber products; and has sold, offered for sale, delivered, transported and caused to be transported, textile fiber products, which have been offered for sale in commerce; and has sold, offered for sale, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber products" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by the respondent within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products (tennis jackets) with labels which set forth the fiber content as "65% Cotton, 35% Polyester," whereas, in truth and in fact, the said textile fiber products contained substantially different amounts of fibers than represented.

PAR. 4. The acts and practices of respondent as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, as amended; and

Respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Regal Apparel Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with their office and principal place of business located at 124 E. Olympic Blvd., Los Angeles, Calif.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Regal Apparel Ltd., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising or offering for sale in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile product, which has been advertised or offered for sale in commerce, or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce of any textile product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

HARBOR BANANA DISTRIBUTORS, INC.*

MODIFIED ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8795. Complaint, July 28, 1969 - Modified Order, Jan. 3, 1975

Order modifying an earlier order dated Jan. 12, 1973, 38 F. R. 5160, 82 F.T.C. 53, pursuant to order of Aug. 22, 1974, of the United States Court of Appeals for the Fifth Circuit,** denying enforcement of the portion of the order under Counts I and II of the complaint alleging violations of Sections 2(a) and 2(f) of the Clayton Act, as amended, and ordering enforcement of the portion of the order under Count IV of the complaint charging a violation of Section 7 of the Act.

Appearances

For the Commission: *James T. Halverson.*

For the respondent: *Deutsch, Kerrigan & Stiles*, New Orleans, La.

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* Title of case changed by Commission direction of Apr. 11, 1975, so that in the future no reference will appear in the title to any parties that have been dismissed.

** Neither party filed petition for *certiorari*.

Modified Order to Cease and Desist

Respondents having filed in the United States Court of Appeals for the Fifth Circuit petitions to review the order to cease and desist issued herein on Jan. 12, 1973 [82 F.T.C. 53]; and the Court, on Aug. 22, 1974 [499 F.2d 395 (1974)], having rendered its decision, denying enforcement of the portion of the order under Counts I and II of the complaint alleging violations of Sections 2(a) and 2(f) of the Clayton Act, as amended, and ordering enforcement of the portion of the order under Count IV of the complaint charging a violation of Section 7 of the Act; and the time in which to file a petition for *certiorari* having expired without either party having filed such a petition;

Now therefore, it is ordered, That the aforesaid order to cease and desist be modified, in accordance with said final order of the Court of Appeals, to read as follows:

I

It is ordered, That Counts I-III of the complaint be dismissed.

II

It is further ordered, That:

1. Respondent Harbor Banana Distributors, Inc., a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors, and assigns, within six (6) months from the date of service upon it of this order, shall divest, absolutely and in good faith, subject to the approval of the Federal Trade Commission, all assets, properties, rights and privileges, tangible and intangible, including, but not limited to, all plants, equipment, and machinery acquired by Harbor Banana Distributors, Inc., as a result of its acquisition of the Charles C. McCann Company, and Tradewinds Produce, Inc., together with the goodwill created by the use of such assets, and all additions and improvements thereto, of whatever description, so as to restore that which formerly made up the Charles C. McCann Company, and Tradewinds Produce, Inc. as a viable competitive entity in the business of processing, selling and distributing bananas.

2. None of the assets, properties, rights or privileges, described in Paragraph IV, 1., of this order, shall be divested, directly or indirectly, to any person who is, at the time of the divestiture, an officer, director, employee, or agent, or under the control or direction of, respondent Harbor Banana Distributors, Inc. or any of respondent's subsidiary or affiliated corporations, or owns or controls, directly or indirectly, more

than one (1) percent of the outstanding shares of common stock of Harbor Banana Distributors, Inc.

3. Pending divestiture, respondent Harbor Banana Distributors, Inc. shall not make or permit any deterioration in any of the plants, machinery, buildings, equipment or other property or assets of the companies to be divested that may impair their present capacity or market value, unless such capacity or value is restored prior to divestiture.

III

It is further ordered, That respondent Harbor Banana Distributors, Inc. shall not, for a period of ten (10) years from the date of service of this order, acquire, directly or indirectly, through subsidiaries, joint ventures, or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, or assets of any concern engaged in the processing, sale, or distribution of bananas.

IV

It is further ordered, That respondent Harbor Banana Distributors, Inc. shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in its corporate organization, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

V

It is further ordered, That Harbor Banana Distributors, Inc., shall within sixty (60) days after service on it of this order, and every sixty (60) days thereafter until it has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying, and/or has complied with this order. All compliance reports shall include, among other things that will be from time to time required, a summary of all contacts and negotiations with potential purchasers of the stock and/or assets to be divested under this order, the identity of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

IN THE MATTER OF

INSURANCE FINANCE PLAN CO., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2622. Complaint, Jan. 6, 1975 - Decision, Jan. 6, 1975

Consent order requiring a Central Falls, R.I., moneylender in connection with the financing of insurance premiums, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Lois M. Woocher.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing Regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Insurance Finance Plan Co., a corporation, and Maurice R. Loiselle, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Insurance Finance Plan Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 887 Dexter St., Central Falls, R.I.

Respondent Maurice R. Loiselle is an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporation, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the business of lending money to the public in connection with the financing of insurance premiums.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend consumer credit as "consumer credit" is defined in Regulation Z, the implementing Regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business as aforesaid, have caused and are causing to be extended consumer credit, as "consumer credit" is defined in Regulation Z, and have caused and are causing customers to execute a binding combination promissory note and disclosure statement, hereinafter referred to as the "statement." Respondents do not provide these customers with any other consumer credit cost disclosures.

By and through the use of the statement, respondents:

1. Failed to use the term "cash price" as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the item, as required by Section 226.8(c)(1) of Regulation Z.

2. Failed to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

3. Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

4. Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

5. Failed in some instances to furnish consumers with a duplicate of the instrument containing the required disclosures or a statement by which the required disclosures are made, as required by Section 226.8(a) of Regulation Z.

PAR. 5. Subsequent to July 1, 1969, respondents have caused to be published advertisements as "advertisement" is defined in Section 226.2(b) of Regulation Z for the purpose of aiding, promoting or assisting, directly or indirectly, the extension of consumer credit in connection with the financing of insurance premiums. By and through the use of these advertisements, the respondents have stated the period of repayment without also stating all of the following items in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

1. The cash price;

2. The amount of the downpayment required or that no downpayment is required, as applicable;

3. The number, amount, and due dates or periods of payments scheduled to repay the indebtedness if the credit is extended;

4. The amount of the finance charge expressed as an annual percentage rate; and

5. The deferred payment price.

PAR. 6. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commision having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder and violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Insurance Finance Plan Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 887 Dexter St., Central Falls, R.I.

Respondent Maurice R. Loiselle is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of the said corporation, and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is the public interest.

ORDER

It is ordered, That respondents Insurance Finance Plan Co., a corporation, its successors or assigns, and its officers, and Maurice R. Loiselle, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq*) do forthwith cease and desist from:

1. Failing to use the term "cash price," as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the item, as required by Section 226.8(c)(1) of Regulation Z.

2. Failing to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

3. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment as required by Section 226.8(c)(3) of Regulation Z.

4. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

5. Failing to furnish the consumer with a duplicate of the instrument containing the required disclosures or a statement by which the required disclosures are made, as required by Section 226.8(a) of Regulation Z.

6. Failing in any consumer credit transaction or advertising to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

7. Stating in any advertisement the period of repayment which can be arranged in connection with a consumer credit transaction, without also stating all of the following items in terminology prescribed under

Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z.

(i) The cash price;

(ii) The amount of the downpayment required or that no downpayment is required, as applicable;

(iii) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness if the credit is extended;

(iv) The amount of the finance charge expressed as an annual percentage rate; and

(v) The deferred payment price.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents now or hereafter engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation or placing of advertising; and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

In the Matter of

INSURANCE BUDGETING, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2623. Complaint, Jan. 6, 1975 - Decision, Jan. 6, 1975

Consent order requiring a Providence, R.I., insurance premium financier, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Marc A. Comras.*
For the respondents: *Pro se.*

Complaint

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Insurance Budgeting, Inc., a corporation, and Richard A. L'Europa, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent Insurance Budgeting, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 10 Dorrance St., Providence, R.I.

Respondent Richard A. L'Europa is an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporation, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

Par. 2. Respondents are now, and for some time last past have been, engaged in the business of lending money to the public in connection with the financing of insurance premiums.

Par. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents in the ordinary course of business as aforesaid, have caused and are causing to be extended consumer credit as "consumer credit" is defined in Regulation Z, and have caused and are causing customers to execute a binding premium financing agreement, hereinafter referred to as the "agreement." Respondents do not provide these customers with any other consumer credit cost disclosures.

By and through the use of the agreement respondents:

1. Failed in some instances to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

2. Failed in some instances to disclose the annual percentage rate computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

3. Failed in some instances to disclose the annual percentage rate accurately to the nearest quarter of one percent in accordance with the provisions of Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

4. Provide additional information which misleads or confuses the customer or obscures or detracts attention from the information required to be disclosed by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

5. Failed to make the disclosures required by Section 226.8 of Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the

Truth in Lending Act and the implementing regulation promulgated thereunder and violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of the rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Insurance Budgeting, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 10 Dorrance St., Providence, R.I.

Respondent Richard A. L'Europa is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Insurance Budgeting, Inc., a corporation, its successors and assigns, and its officers, and Richard A. L'Europa, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*) do forthwith cease and desist from:

1. Failing to disclose the sum of the cash price, all charges which are

included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price" as required by Section 226.8(c)(8)(ii) of Regulation Z.

2. Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

3. Failing to disclose the annual percentage rate accurately to the nearest quarter of one percent in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

4. Stating, utilizing or placing any additional information in conjunction with the disclosures required by Regulation Z to be made, which information misleads or detracts attention from the information required by Regulation Z to be disclosed.

5. Failing to make all disclosures required by Regulation Z clearly, conspicuously, and in meaningful sequence, as required by Section 226.6(a) of Regulation Z.

6. Failing in any consumer credit transaction or advertisement to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to all present and future personnel of respondents now or hereafter engaged in the consummation of any extension of consumer credit or in any aspect of the preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

KOSCOT INTERPLANETARY, INC., ET AL.

Docket 8888. Order, Jan. 7, 1975

Order directing general counsel to take necessary and appropriate action to preserve restitutionary or any other consumer redress claim.

Appearances

For the Commission: *Quentin P. McColgin* and *David C. Keehn.*
For the respondents: *Leonard & Cohen,* Wash., D. C.

ORDER DIRECTING GENERAL COUNSEL TO TAKE NECESSARY AND APPROPRIATE ACTION TO PRESERVE POSSIBLE RESTITUTIONARY CLAIM

This matter is before us on the administrative law judge's order of Dec. 23, 1974, certifying complaint counsel's "Motion that the General Counsel be Directed to Take Action to Preserve the Commission's Claim Against Respondent Koscot Interplanetary, Inc.," which motion respondents have not answered. Specifically complaint counsel report that respondent Koscot Interplanetary, Inc. is in bankruptcy proceedings wherein a settlement is pending which could foreclose any claim in restitution which might arise out of this action. Such a foreclosure would be contrary to the public interest. Accordingly,

It is ordered, That the General Counsel take such action as is necessary and appropriate for the protection of the public interest in any restitutionary claim or any other claim for consumer redress which may arise out of the above-captioned proceeding.

IN THE MATTER OF

HOLIDAY MAGIC, INC., ET AL.

Docket 8834. Order, Jan. 8, 1975

Denial of respondent Olivo's motion for reconsideration and motion for modification of final order; denial without prejudice to resubmission at appropriate time, of respondent's petition to reopen proceedings concerning adequacy of funds; and denial of respondent's motion for extension of time to file briefs in support of aforementioned motions and petition.

Appearances

For the Commission: *Joseph S. Brownman* and *D. Stuart Cameron.*

For the respondents: *Shearer, Lanctot, Thomas & Knorp*, San Francisco, Calif.

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION, ET AL.

On Oct. 15, 1974 84 F.T.C. 347, the Commission issued its decision and order in this matter. Respondent Olivo has timely filed for reconsideration and modification of the order as it affects him, pursuant to Section 3.55 of the rules of practice, and has petitioned that the matter be reopened for consideration of the ability of respondent Olivo, as executor for the estate of William Penn Patrick, to make restitution as required by the order of the Commission.[1] An extension of time is also sought within which to file briefs in support of the motions for reconsideration and reopening. Complaint counsel have filed an Answer opposing the motions. For the reasons stated below, the motion for reconsideration and modification must be denied with prejudice, while the motion for reopening will be denied but without prejudice to renewal at such time as the order herein (pursuant to which the motion for reopening would appropriately be made) becomes final.

Section 3.55 requires in part that:

> Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission.

Respondent's motion for reconsideration and modification entirely fails to meet the requirements of the pertinent rule, inasmuch as respondent Olivo was given ample opportunity subsequent to his substitution as a party in this case to brief the issues now raised. The withdrawal of counsel to which reference is made in the motion apparently occurred well after the time allotted for such briefing.

In addition, the Commission has fully considered in reaching its final decision the arguments raised by counsel in the motion to reconsider. The Commission does not see any conflict or inconsistency between a consent settlement which permits the estate of a wrongdoer to escape primary liability for the violation of one law, and a litigated order which requires the estate to make restitution based on violation of a different law. The reasons for differing treatment of the corporation and executor with respect to restitution are stated in the Commission's decision, and relate to the differing obligations imposed on the two by prior consent settlements. The motion for reconsideration simply confirms the propriety of the distinction that was made. Nor, we believe, does the fact that the estate is subject for certain purposes to the jurisdiction of the Marin Superior Court in any way affect the authority and duty of the Commission to adjudicate the obligations of the executor under Section 5.

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[1] "Motion for Reconsideration and Motion for Modification of Final Order; and Petition to Reopen Proceedings Concerning Adequacy of Funds," filed Dec. 11, 1974. Respondent received an extension of seven days, beyond the 20 allowed by the rules, within which to file a motion for reconsideration, and said motion has been filed within 27 days of the date of service of the final order upon him.

Those points raised by respondent concerning the difficulty of compliance with the order, and the lack of funds with which to comply, may properly be addressed at the compliance stage. Paragraph V(3)(e) of the final order provides that respondent may petition to reopen within 60 days of the effective date of the order upon a claim that respondent lacks sufficient funds to make restitution. If, as respondent implies, he lacks access to the names of distributors which the order provides shall accompany an application for reopening, that fact should be indicated clearly in the petition and this will not be a bar to the reopening. The petition to reopen this matter is at this stage, however, premature, and will therefore be rejected without prejudice to renewal at such time as the order in this matter becomes final. The motion for an extension of time within which to file briefs relating to respondent's motions and petition will also be denied as no valid reason has been given to warrant the delay. Therefore,

It is ordered, That respondent's Motion for Reconsideration and Motion for Modification of Final Order be denied, and that respondent's Petition to Reopen Proceedings Concerning Adequacy of Funds be denied without prejudice to resubmission at an appropriate time; and

It is further ordered, That respondent's Motion for Extension of Time to File Briefs in Support of Motion for Reconsideration and Motion for Modification and Petition to Reopen Proceedings Concerning Adequacy of Funds be denied.

Commissioner Nye not participating.

IN THE MATTER OF

RELIABLE MORTGAGE CORPORATION, ET AL.

ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 8956. Complaint, Mar. 5, 1974 - Decision, Jan. 8, 1975

Order requiring a Los Angeles, Calif., loan company, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *David G. Cameron* and *Kendall H. MacVey.*

For the respondents: *Alvin F. Howard, Horowitz, Howard* and *Bloom,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Reliable Mortgage Corporation, a corporation, and Edward Siegel, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and implementing regulation and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Reliable Mortgage Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 320 N. Vermont Ave., Los Angeles, Calif.

Respondent Edward Siegel is an individual and is the principal corporate officer of Reliable Mortgage Corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for many years have been, engaged in the business of arranging loans secured by real property for a fee.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business as aforesaid, have caused to be published, advertisements, as "advertisement" is defined in Section 226.2 of Regulation Z, which advertisements aided, promoted, or assisted, directly or indirectly, the extension of other than open end credit. Respondents, in certain of these advertisements, have stated the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an annual percentage rate, using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 5. By and through the acts and practices set forth above, respondents have failed to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Act, such failure to comply constitutes a violation of the Truth in Lending Act, and, pursuant to Section 108 thereof, respondents have violated the Federal Trade Commission Act.

INITIAL DECISION BY HARRY R. HINKES, ADMINISTRATIVE LAW JUDGE

November 11, 1974

PRELIMINARY STATEMENT

In a complaint issued by the Federal Trade Commission on Mar. 5, 1974, respondents Reliable Mortgage Corporation and Edward Siegel were charged with failing to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of that act, such failure to comply constitutes a violation of the Truth in Lending Act and pursuant to Section 108 thereof respondents were charged to have violated the Federal Trade Commmission Act. In their answer to the complaint respondents denied Paragraphs Four and Five of the complaint which charge a violation of law. In addition, as an affirmative defense, respondents alleged that any order issued herein would injure the consuming public and interfere with competitive conditions. Respondents, however, made no answer to Paragraphs One, Two or Three of the complaint which establish the identity of the respondents and the nature of their business. Paragraphs One, Two and Three of the complaint are, therefore, deemed to have been admitted pursuant to Section 3.12(b)(1)(ii) of the Rules of Practice of the Federal Trade Commission.

On May 13, 1974, respondents were served by complaint counsel with a request for admissions. Respondents did not respond to this request. Indeed, counsel for the respondents in a letter dated June 17, 1974, stated:

> We will not reply to your request for admissions, and they will be automatically admitted under the rules.

Indeed, Section 3.31 of the Commission's Rules of Practice dealing with admissions states:

(b) The matter is admitted unless within 10 days after the service of the request . . . the party to whom the request is directed serves upon the party requesting the admission . . . a sworn written answer or objection addressed to the latter* * *.

After unsuccessful attempts at settlement, complaint counsel filed a Motion for Summary Decision on Sept. 24, 1974, alleging that there was no genuine issues as to any material fact and that a decision should be rendered as a matter of law. Counsel for the respondent then withdrew from this proceeding and, with the consent of the respondents, substituted the respondents *in propria persona*. Nevertheless, oral argument was set on complaint counsel's Motion for Summary Decision and respondents were advised of the date and place for said oral argument. By letter dated Oct. 7, 1974, respondents indicated their intention not to appear at oral argument. Oral argument was held on Oct. 15, 1974. Respondents did not appear nor were they represented.

On the basis of the complaint, respondents' answer to the complaint and complaint counsel's request for admissions which went unanswered by respondents, I make the following:

FINDINGS OF FACT

1. Respondent Reliable Mortgage Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 320 N. Vermont Ave., Los Angeles, Calif.

Respondent Edward Siegel is an individual and is the principal corporate officer of Reliable Mortgage Corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his address is the same as that of the corporate respondent. (Par. 1 of the Comp.)

2. Respondents are now, and for many years have been, engaged in the business of arranging loans secured by real property for a fee. (Par. 2 of the Comp.)

3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arranged for the extension of consumer credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. (Par. 3 of the Comp.)

4. Respondents caused to be published an advertisement stating "At Reliable Mortgage your loan will cost you a lot less. Our interest rate is 8-1/2 percent." The ad does not contain the words "annual percentage rate." (Comp. Counsel's unanswered request for admissions.)

5. The above ad was published in the following newspapers on the dates indicated:

Los Angeles Times: Feb. 19, 20, 25, Mar. 4, 11, 18 and 25, 1973.

Orange County Metro Group: Feb. 19 and 20, 1973.

Santa Ana Register: Feb. 25, 26, 27, 28, Mar. 4, 11, 18 and 25, 1973.

San Gabriel Valley Tribune: Feb. 19, 20, 25, Mar. 4, 11, 18, and 25, 1973. (Comp. Counsel's unanswered request for admissions.)

6. Respondents caused to be published an advertisement stating: "A second trust deed loan for less than 10 per cent interest." The ad does not contain the words "Annual percentage rate." (Comp. Counsel's unanswered request for admissions.)

7. The above ad was published in the following newspapers on the dates indicated:

Los Angeles Times: Apr. 8, 29, May 6, 13, 20, 27, June 3 and 10, 1973.

Santa Ana Register: Apr. 22, 29, May 13 and 20, 1973.

Long Beach Independent: Apr. 8, 1973.

Los Angeles Sentinel: Apr. 12, 19, 26, May 3 and 10, 1973. (Comp. Counsel's unanswered request for admissions.)

COMMENT

Section 226.10 of Regulation Z implementing the Truth in Lending Act states:

> No advertisement to aid, promote or assist, directly, or indirectly, any credit sale . . . shall state (1) the rate of a finance charge unless it states the rate of that charge expressed as an "annual percentage rate" using that term* * *.

It is clear that here respondents advertised a finance charge of 8-1/2 percent interest without specifying the annual percentage rate. Such ads were, therefore, violative of Regulation Z. *Beauty-Style Modernizers, Inc.*, Docket No. 8898, June 11, 1974 [83 F.T.C. 1759].

Some comment may be appropriate with respect to respondents' affirmative defense. In it respondents allege that they ceased the advertisements to which the Commission had made objection even though they believed the Commission's objections were unjustified and that the unfavorable publicity of this proceeding has injured the consuming public by discrediting the respondents although their interest charges were lower than others in competition with them. The Commission has held, however, that:

> the fact that past unlawful practices have ceased or been suspended is no assurance that they will not be resumed at some time in the future, absent the deterrent effect of a Commission order with the possibility of heavy civil penalities for violation. (*Koppers Co., Inc.* 77 F.T.C. 1675, 1684.)

See, also *Certified Building Products, Inc.* Docket 8875, Oct. 5, 1973 [83 F.T.C. 1004], CCH Trade Regulation Rep. ¶20,506 and *Zale Corporation*, 78 F.T.C. 1195, 1240.

I do not agree that compelling respondents to disclose their annual percentage rate would injure the public by discrediting them. If, indeed, respondents' annual percentage rate is lower than the rate charged by their competition it would appear advantageous to the respondent to advertise such annual percentage rate so that the consuming public may be able to compare the two easily.

ORDER

It is ordered, That complaint counsel's Motion for Summary Decision be, and the same hereby is, *granted*.

It is further ordered, That respondents Reliable Mortgage Corporation, a corporation, its successors and assigns and its officers and Edward Siegel, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Stating the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 of Regulation Z, as prescribed by Section 226.10(d)(1) of Regulation Z.

2. Stating or utilizing any component of the annual percentage rate, such as the rate of interest, when such component is stated or utilized more conspicuously than the annual percentage rate.

3. Failing, in any advertisement, to make all disclosures as required by Section 226.10 of Regulation Z and in the manner prescribed therein.

It is further ordered, That respondent corporation, its successors and assigns, shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

FINAL ORDER

The administrative law judge filed his initial decision in this matter on Nov. 11, 1974, finding respondents to have engaged in the acts and practices as alleged in the complaint and entering a cease-and-desist order against respondents. A copy of the initial decision and order was served on the respondents on Nov. 29, 1974. No appeal was taken from the initial decision.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision should become effective as provided in Section 3.51(a) of the Commission's Rules of Practice.

It is ordered, That the initial decision and order contained therein shall become effective on Dec. 30, 1974.

It is further ordered, That Reliable Mortgage Corporation, a corporation, and Edward Siegel, individually and as an officer of said corporation, shall within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8907. Complaint, Dec. 11, 1972 - Decision, Jan. 10, 1975

Consent order requiring a Detroit, Mich., automobile manufacturer, among other things to cease making unsubstantiated comparative claims as to the handling characteristics of automobiles. Further, the order dismisses the allegations of the complaint relating to the "Lubed-for-life chassis" claim for the Opel automobile. The complaint is dismissed as to respondent McCann-Erickson, Inc., G.M.'s New-York-City-based advertising agent.

Consent order requiring a Detroit, Mich., advertising agency, among other things to cease making unsubstantiated comparative claims as to the handling characteristics of automobiles.

Appearances

For the Commission: *Matthew Daynard* and *Edward D. Steinman.*

For the respondent: *Covington & Burling* and *Howrey, Simon, Baker & Murchison*, Washington, D.C. *Edwin A. Kiernan, Jr.*, N.Y., N.Y. *Hill, Lewis, Adams, Goodrich & Tait*, Detroit, Mich.

COMPLAINT*

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that General Motors Corp., Campbell-Ewald Co., and McCann-Erickson, Inc., corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent General Motors Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3044 W. Grand Blvd., Detroit, Mich.

PAR. 2. Respondent Campbell-Ewald Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3044 W. Grand Blvd., Detroit, Mich.

PAR. 3. Respondent McCann-Erickson, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 485 Lexington Avenue, New York, N.Y.

PAR. 4. Respondent General Motors Corporation is now, and for some time last past has been, engaged in the manufacture, distribution, sale, and advertising of Chevrolet Vega and Buick Opel automobiles.

PAR. 5. Campbell-Ewald Co. is now, and for some time last past has been, an advertising agency of General Motors Corp., and now and for some time last past, has prepared and placed for publication and has caused dissemination of advertising material, including, but not limited to, the advertising referred to herein, to promote the sale of Chevrolet Vega automobiles.

PAR. 6. Respondent McCann-Erickson, Inc. is now, and for some time last past has been, an advertising agency of General Motors Corporation, and now and for some time last past, has prepared and placed for publication and has caused dissemination of advertising material, including, but not limited to, the advertising referred to herein, to promote the sale of Buick Opel automobiles.

PAR. 7. Respondent General Motors Corporation causes the said products, when sold, to be transported from its places of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent General Motors Corporation, maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

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* Complaint published as amended by administrative law judge, Feb. 26, 1973, Mar. 14, 1973 and Mar. 19, 1973.

PAR. 8. In the course and conduct of their businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said automobiles in commerce, as "commerce" is defined in the Federal Trade Commission Act, by means of radio broadcasts transmitted by radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said automobiles in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 9. Typical of the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are the following:

(a) a radio commercial prepared for use by local dealers during the period Feb. 10, 1971 to Feb. 21, 1971, and May 1, 1971 to June 5, 1971, numbered C-V-1-1262-RT-60, entitled "DRIVE A VEGA," contains the following text:

> *ANNCR:* There's only one way, really, to find out what a Chevy Vega is all about, and that's to drive one. Road and Track Magazine drove one and wound up saying * * * "Vega is beyond a doubt the best handling passenger car ever built in the U.S." Notice they didn't say the best handling *little* car * * * or the best handling *economy* car, but simply * * * the best handling passenger car. Now if you find that a little hard to swallow, we'll understand. After all, who'd expect an economical little car like Vega to be a hero on the highway? You'd expect it to be * * * well * * * economical. And Vega is. But Vega is *more*. Actually, it handles more like a sports car than an economy car. The steering is quick and easy yet nice and firm on straightaways. Acceleration is brisk, braking is excellent, the ride is smooth and quiet. (PAUSE) Vega. The little car that does everything well.

(b) a radio commercial broadcast on the CBS radio network on Feb. 12, 1971 at 6:00 P.M. Eastern Daylight Time, entitled "DON'T BUY" contains the following text:

> The new Opel 1900 * * * lubed-for-life chassis.

PAR. 10. Through the use of said advertisement, identified in Paragraph Nine(a), and others similar thereto not specifically set out herein, disseminated as aforesaid, respondents General Motors Corporation and Campbell-Ewald Co. have represented, directly and by implication, that at the time that said respondents made the claims set forth in Paragraph Nine(a), said respondents had a reasonable basis from which to conclude that the Chevrolet Vega is the best handling passenger car ever built in the United States.

PAR. 11. In truth and in fact, at the time that respondents General

Motors Corporation and Campbell-Ewald Co. made the claims set forth in Paragraph Nine(a), said respondents had no reasonable basis from which to conclude that the Chevrolet Vega is the best handling passenger car ever built in the United States.

Therefore, the statements and representations set forth in Paragraphs Nine(a) and Ten were, and are, deceptive or unfair acts or practices.

PAR. 12. Through the use of said advertisement, identified in Paragraph Nine(b), and others similar thereto not specifically set out herein, disseminated as aforesaid, respondents General Motors Corporation and McCann-Erickson, Inc. have represented, directly and by implication, that at the time that said respondents made the claim set forth in Paragraph Nine(b), said respondents had a reasonable basis from which to conclude that the chassis of the Buick Opel 1900 never needs lubrication.

PAR. 13. In truth and in fact, at the time that respondents General Motors Corporation and McCann-Erickson, Inc. made the claim set forth in Paragraph Nine(b), said respondents had no reasonable basis from which to conclude that the chassis of the Buick Opel 1900 never needs lubrication.

Therefore, the statements and representations set forth in Paragraphs Nine(b) and Twelve were, and are, deceptive or unfair acts or practices.

PAR. 14. Respondents General Motors Corporation and Campbell-Ewald Co. have represented, through the use of the aforesaid advertisement and otherwise, directly and by implication, that the Chevrolet Vega is the best handling passenger car ever built in the United States.

At the time of said representation, said respondents had no reasonable basis to support said representation pertaining to the handling qualities of Chevrolet Vega automobiles.

Therefore, the aforesaid acts and practices were, and are, deceptive or unfair.

PAR. 15. Respondents General Motors Corporation and McCann-Erickson, Inc. have represented, through the use of the aforesaid advertisement and otherwise, directly and by implication, that the chassis of the Buick Opel 1900 never needs lubrication.

At the time of said representation, said respondents had no reasonable basis to support said representation pertaining to the economy of Buick Opel automobiles.

Therefore, the aforesaid acts and practices were, and are, deceptive or unfair.

PAR. 16. In the course and conduct of its aforesaid business, and at all times mentioned herein respondent General Motors Corporation, has been and now is in substantial competition in commerce with corporations, firms and individuals engaged in the sale and distribution of automobiles of the same general kind and nature as that sold by respondent.

PAR. 17. In the course and conduct of their aforesaid businesses, and at all times mentioned herein, respondents Campbell-Ewald Co. and McCann-Erickson, Inc., have been, and now are, in substantial competition in commerce with other advertising agencies.

PAR. 18. The use by respondents of the aforesaid unfair or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of Chevrolet Vega and Buick Opel automobiles. As a result thereof, substantial trade is being unfairly diverted to respondent from its competitors.

PAR. 19. The aforesaid acts and practices of respondents as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair or deceptive acts or practices in commerce and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER AS TO GENERAL MOTORS COPRORATION AND MCCANN-ERICKSON, INC.

The Commission having issued its complaint on Dec. 11, 1972, charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with a copy of that complaint; and

The Commission having duly determined upon motion certified to the Commission that, in the circumstances presented, the public interest would be served by waiver here of the provision of Section 2.34(d) of its rules which provides that the consent order procedure shall not be available after issuance of complaint; and

The respondents and counsel for the Commission having executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's Rules; and

The Commission having thereafter considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, and having provisionally accepted said agreement, and the agreement containing consent order having been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order in disposition of the proceeding:

1. Respondent General Motors Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3044 W. Grand Blvd., in the city of Detroit, State of Michigan.

Respondent McCann-Erickson, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 485 Lexington Ave., in the city of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent General Motors Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, in any manner, including the use of any endorsement, testimonial or statement made by any individual, group or organization, that any automobile is superior in handling to any other automobile or all other automobiles, unless at the time that any such representation is first disseminated:

(a) respondent has a reasonable basis for such representation, which shall consist of a competent scientific test or tests that substantiate such representation; and

(b) respondent's agents, employees or representatives who are responsible for engineering approval of any advertisement containing such representation rely on such test or tests in approving such advertisement and provide to respondent's agents, employees or representatives who are responsible for approval of such advertisement a written statement that such test or tests exist which substantiate the representation.

2. Failing to maintain and produce accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of the documentation constituting the reasonable basis required by Paragraph I.1 of this order and which demonstrate that respondent's representatives relied on such reasonable basis as required in Paragraph I.1(b) of this order; and

(b) which shall be maintained by respondent for a period of three (3) years from the date on which any advertisement containing any such representation was last disseminated.

II

It is further ordered, That for the purposes of Paragraph I of this order:

1. The word "handling" shall be defined in terms of the response of the vehicle:

(a) under conditions where rapid steering inputs in evasive or emergency maneuvers are necessary;

(b) under cornering conditions at speeds in excess of 30 miles per hour in which levels of lateral acceleration in excess of .2g are attained; and

(c) in gusty crosswinds, on rough roads and under severe steering-braking conditions.

2. A statement as to the handling characteristics of an automobile implies that the automobile is superior in handling to any other automobile or all other automobiles if the statement is phrased in the comparative or superlative degree, or if any advertising containing such statement conveys a net impression of comparative handling superiority; *Provided, however,* That any statement or statements in such advertising phrased in the comparative or superlative degree regarding any characteristic or characteristics other than handling will not, for that reason alone and without a statistically valid consumer survey, render any statement in such advertising which does relate to the handling characteristics of an automobile and which is phrased in the positive degree to be deemed a representation that the automobile is superior in handling to any other automobile or all other automobiles.

3. "Scientific test" shall be defined and construed in accordance with the Federal Trade Commission's order as stated in *Firestone Tire [Rubber Co.*, Docket No. 8818 [81 F.T.C. 398].

> In our view a scientific test is one in which persons with skill and expertise in the field conduct the test and evaluate its results in a disinterested manner using testing procedures generally accepted in the profession which best insure accurate results. This

is not to say that respondent always must conduct laboratory tests. The appropriate test depends on the nature of the claim made. Thus a road or user test may be an adequate scientific test to substantiate one performance claim, whereas a laboratory test may be the proper test to substantiate another claim. Respondent's obligation is to assure that any claim it makes is adequately substantiated by the results of whatever constitutes a scientific test in those circumstances.

III

It is further ordered, That the allegations of the complaint relating to the "lubed-for-life chassis" claim for the Opel automobile be, and hereby are, dismissed and that the complaint be, and hereby is, dismissed as to respondent McCann-Erickson, Inc. Further, all information submitted to the Commission supporting the aforementioned claim shall be placed on the public record.

IV

It is further ordered, That respondent General Motors Corporation shall forthwith distribute a copy of this order to each of its officers, agents, representatives or employees who are engaged in the creation or approval of advertisements.

V

It is further ordered, That respondent General Motors Corporation notify the Commission at least thirty (30) days prior to any proposed change in said corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

VI

It is further ordered, That respondent General Motors Corporation shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

DECISION AND ORDER AS TO CAMPBELL-EWALD CO.

The Commission having issued its complaint on Dec. 11, 1972, charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with a copy of that complaint; and

The Commission having duly determined upon motion certified to the Commission that, in the circumstances presented, the public interest would be served by waiver here of the provision of Section 2.34(d) of its rules which provides that the consent order procedure shall not be available after issuance of complaint; and

The respondent and counsel for the Commission having executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having thereafter considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, and having provisionally accepted said agreement, and the agreement containing consent order having been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order in disposition of the proceeding:

1. Respondent Campbell-Ewald Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3044 W. Grand Blvd., in the city of Detroit, State of Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Campbell-Ewald Co., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, in any manner, including the use of any endorsement, testimonial or statement made by any individual, group or organization, that any automobile is superior in handling to any other automobile or all other automobiles, unless at the time that any such representation is first disseminated:

(a) respondent or its client has a reasonable basis for such representation which shall consist of a competent scientific test or tests that substantiate such representation; or

(b) respondent has a reasonable basis for such representation which shall consist of an opinion in writing signed by a person qualified by education and experience to render such an opinion (who, if qualified by education and experience, may be a person retained or employed by respondent's client) that a competent scientific test or tests exist to substantiate such representation, provided that any such opinion also discloses the nature of such test or tests and; *Provided further*, That respondent neither knows nor has reason to know that such test or tests do not in fact substantiate such representation or that any such opinion does not constitute a reasonable basis for such representation.

2. Failing to maintain and produce accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of the documentation constituting the reasonable basis required by Paragraph I.1 of this order or, if respondent's compliance with Paragraph I.1 is based on its clients' reasonable basis, which consist of a memorandum so indicating; and

(b) which shall be maintained by respondent for a period of three (3) years from the date on which any advertisement containing any such representation was last disseminated by respondent.

II

It is further ordered, That for the purposes of Paragraph I of this order:

1. The word "handling" shall be defined in terms of the response of the vehicle:

(a) under conditions where rapid steering inputs in evasive or emergency maneuvers are necessary;

(b) under cornering conditions at speeds in excess of 30 miles per hour in which levels of lateral acceleration in excess of .2g are attained; and

(c) in gusty crosswinds, on rough roads and under severe steering-braking conditions.

2. A statement as to the handling characteristics of an automobile implies that the automobile is superior in handling to any other automobile or all other automobiles if the statement is phrased in the comparative or superlative degree, or if any advertising containing such statement conveys a net impression of comparative handling superiority; *Provided, however*, That any statement or statements in such advertising phrased in the comparative or superlative degree regarding any characteristic or characteristics other than handling will not, for that reason alone and without a statistically valid consumer

survey, render any statement in such advertising which does relate to the handling characteristics of an automobile and which is phrased in the positive degree to be deemed a representation that the automobile is superior in handling to any other automobile or all other automobiles.

3. "Scientific test" shall be defined and construed in accordance with the Federal Trade Commission's order as stated in *Firestone Tire [Rubber Co.*, Docket No. 8818 [81 F.T.C. 398].

> In our view a scientific test is one in which persons with skill and expertise in the field conduct the test and evaluate its results in a disinterested manner using testing procedures generally accepted in the profession which best insure accurate results. This is not to say that respondent always must conduct laboratory tests. The appropriate test depends on the nature of the claim made. Thus a road or user test may be an adequate scientific test to substantiate one performance claim, whereas a laboratory test may be the proper test to substantiate another claim. Respondent's obligation is to assure that any claim it makes is adequately substantiated by the results of whatever constitutes a scientific test in those circumstances.

III

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its officers, agents, representatives or employees who are engaged in the creation or approval of advertisements.

IV

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in said corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

V

It is further ordered, That respondent shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

FEDDERS CORPORATION

ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8932. Complaint, June 11, 1973 - Final Order, Jan. 14, 1975*

Order requiring an Edison, N.J., distributor of Fedders air conditioners, among other things to cease making false uniqueness claims and false and unsubstantiated claims as to certain performance characteristics for its product and failing to maintain accurate records.

Appearances

For the Commission: *Heidi P. Sanchez* and *Paul G. Foldes.*

For the respondent: *Sydney B. Wertheimer, Weisman, Celler, Spett, Modlin & Wertheimer,* N.Y., N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Fedders Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Fedders Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Edison, N.J.

PAR. 2. Respondent Fedders Corporation is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders room air conditioners, including Fedders Model ACL20E3DX Room Air Conditioners.

PAR. 3. In the course and conduct of its aforesaid business, respondent Fedders Corporation now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various States of the United States, and in the District of Columbia. Respondent Fedders Corporation therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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* Complaint reported as amended by Administrative Law Judge's order of January 10, 1974.

PAR. 4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders Corporation has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent.

PAR. 5. In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of the said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of said room air conditioners, including but not limited to, advertisements printed in newspapers located in various States of the United States and in the District of Columbia, which newspapers are disseminated across states lines.

PAR. 6. Typical of the statements and representations contained in said advertisements, but not all inclusive thereof, is the following segment of the print advertisement for Fedders room air conditioners:

RESERVE Cooling Power - - only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days.

PAR. 7. By and through the use of the aforesaid statements and representations, respondent has represented, directly or by implication, that reserve cooling power is a unique feature of Fedders room air conditioners, not found in other room air conditioners.

PAR. 8. In truth and in fact, "reserve cooling power," referring to an increased cooling capacity at high loading conditions, is not a unique feature of Fedders room air conditioners. In fact, comparable room air conditioners made by other companies provide an increase in cooling capacity at high loading conditions.

Therefore, the statements and representations referred to in Paragraphs Six and Seven were and are false, misleading, and deceptive, and the advertisements referred to in Paragraphs Five, Six, and Seven were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 9. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use.

PAR. 10. In truth and in fact, at the time the aforesaid statements and representations were made, respondent had no reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use.

Therefore, the statements and representations referred to in Paragraphs Six, Nine, and Ten were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Five and Six were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 11. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, respondent had no reasonable basis from which to conclude that such was the fact.

Therefore, the statements and representations referred to in Paragraphs Six and Eleven were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Five and Six were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 12. The use by respondent of the aforesaid unfair or deceptive acts or practices has had, and now has, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts or practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

The following is the form of order which the Commission has reason to believe should issue if the facts are found as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Fedders Corporation might be inadequate fully to protect the consuming public or the competitive conditions of the air conditioning industry, the Commission may order such other relief as it finds necessary or appropriate.

ORDER

I

It is ordered, That respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of the respective products hereinafter referred to, do forthwith cease and desist from:

1. representing, directly or by implication, that an increase in cooling capacity at high loading conditions of Fedders room air conditioners is a unique feature of such air conditioners;

2. representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any other material respect, unless such is the fact;

3. representing, directly or by implication, that Fedders room air conditioners, compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions of use, unless at the time such representation is made, respondent has a reasonable basis for such representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

4. making, directly or indirectly, any other statement or representation in any advertising or sales promotional material as to the performance characteristics of any Fedders air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

5. failing to maintain and produce accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the performance characteristics of, or the uniqueness of any feature of, any Fedders air conditioning product or system; and

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of paragraph 5 shall be in effect for a period of ten (10) years from the date this order becomes final.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days and at the end of six (6) months after the effective date of the order served upon it, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

JULY 15, 1974

PRELIMINARY STATEMENT

Respondent Fedders Corporation, a corporation, is charged with violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). The complaint issued by the Commission on June 11, 1973, alleges that respondent, in connection with the advertising, offering for sale, sale and distribution of its room air conditioners to purchasers thereof, has represented, directly or by implication, through statements and representations in advertisements placed in newspapers of interstate circulation, that "reserve cooling power" (hereinafter sometimes referred to as "RCP") is a unique feature of its room air conditioners, not found in other room air conditioners. However, in truth and in fact, the complaint alleges, RCP, referring to an increased cooling capacity at high loading conditions, is not a unique feature of Fedders room air conditioners, but that, in fact, comparable room air conditioners made by other companies provide an increase in cooling capacity at high loading conditions.

The complaint further alleges that respondent has also represented that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that the Fedders room air conditioners, compared with other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use. In truth and in fact, the complaint alleges, at the time the said statements and representations were made, respondent had no reasonable basis for such statements and representations.

The complaint also alleges that by and through the use of the aforesaid statements and representations in respect to RCP, respondent has represented, directly or by implication, that the Fedders room air conditioners, compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, the complaint alleges, respondent had no reasonable basis from which to conclude that such was the fact.

In brief, the complaint alleges that respondent has (1) made a uniqueness claim for its room air conditioners when such is not a fact, (2) has represented that it had a reasonable basis for making a uniqueness claim for its room air conditioners when it had no reasonable basis for making such a claim, and (3) has represented that its room air conditioners, when compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use when it had no reasonable basis from which to conclude that such was the fact.

The above practices are alleged to have the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of said products by reason of such erroneous and mistaken belief. The said practices are alleged to be false, misleading and deceptive, and constitute unfair methods of competition and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Respondent's Answer, filed Aug. 14, 1973, generally admitted the practices alleged in the complaint, but denied that such conduct was unlawful. Respondent also interposed an affirmative defense, asserting that respondent, "in good faith, many months prior to the issuance of notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to 'reserve cooling power' and has not since resumed the dissemination of any such material." Respondent's Answer also alleges "as and for mitigating circumstances * * * in framing any order" that its claim as to the uniqueness of the RCP feature of its room air conditioners is the only advertising claim of respondent alleged in the complaint to be false, misleading or deceptive, and was one of approximately ten advertising claims made by respondent as to which it was required, by Commission order of Oct. 13, 1971, to furnish supporting material. Respondent's Answer asserts that it "duly furnished such material in response to all the other advertising claims above referred to, and none of such other claims has been challenged by the Commission."

Thereafter, on Aug. 17, 1973, complaint counsel filed a Motion to Strike Affirmative Defenses on the grounds that they are without merit, do not constitute an affirmative defense, and are appropriately denials. On Aug. 24, 1973, Motion of Complaint Counsel for Summary Decision was filed.

At a prehearing conference held on Aug. 27, 1973, it was agreed that complaint counsel would file a motion to amend the complaint, and on that date Motion of Complaint Counsel to Amend Complaint and to Amend Motion for Summary Decision was filed. Thereafter, on Sept. 6, 1973, the undersigned issued an order granting an extension of time until Sept. 21, 1973 for respondent to file an answer to the amended complaint, which time to answer was subsequently extended until Nov. 12, 1973.

At a further prehearing conference held on Nov. 30, 1973, respondent's Answer to Amended Complaint filed on Nov. 12, 1973, was discussed. In its Answer, respondent generally admitted the factual allegations of the complaint (see PHC Tr. 56-60), but denied those paragraphs which allege the respondent's conduct to be unlawful. At the said prehearing conference, the complaint was further amended on the record by the undersigned as follows (PHC Tr. 74):

> I think the two major points were that the complaint is concerned with all Fedders room air conditioners, and is concerned with all advertisements which made the claim that reserve cooling power was unique, and in paragraphs 9 through 12, we are reading into the complaint, "compared with all other room air conditioners." Those are the amendments, and I think making them on the record here is sufficient.

Respondent, in response to the amendments made orally at the prehearing conference, filed an Answer to Further Amended Complaint on Dec. 28, 1973. So that the public record would reflect these amendments to the complaint made at the prehearing conference, an Order Further Amending Complaint was issued by the undersigned on

Jan. 10, 1974. Respondent was given until Jan. 21, 1974 to further amend its Answer, if necessary. No further answer was filed.

The First Stipulation of the Parties was filed on Mar. 19, 1974. This Stipulation provides that the term "reserve cooling power" shall refer to the description of that term which is stated in Paragraphs 5 and 8 through 11 of respondent's Answer to Further Amended Complaint, complaint counsel thereby in effect adopting respondent's definition of RCP in lieu of the definition of that term set forth in the complaint. The Second Stipulation of the Parties, also filed on Mar. 19, 1974, is an agreement that the information contained therein is a fair and accurate description of the extent of dissemination of Fedders room air-conditioner advertising in four sample areas over a two-year period.

A further prehearing conference scheduled for Mar. 27, 1974 was cancelled and rescheduled for Mar. 29, 1974 because of the illness of counsel for respondent. Due to the continued illness of counsel for respondent, the prehearing conference scheduled for Mar. 29, 1974 was cancelled, and a formal hearing was scheduled by the undersigned for Apr. 16, 1974.

At the formal hearing held on Apr. 16, 1974, no witnesses were called; respondent's exhibits 1 A-Z-55, 2 A-B, and Joint Exhibit 1 A-I were received in evidence; complaint counsel's Motion to Strike Affirmative Defenses and Motion for Summary Decision were denied on the record; the record was closed for the reception of evidence; and, upon request of counsel for respondent, the filing of simultaneous proposed findings was postponed from May 16, 1974 to May 30, 1974, and the filing of replies thereto postponed from May 30, 1974 to June 10, 1974 (Tr. 99-101). Respondent's time in which to submit a reply was subsequently extended to June 12, 1974.

A Stipulation of the Parties, dated Apr. 10, 1974, referring to the term "reserve cooling power," was filed on Apr. 12, 1974. On Apr. 24, 1974, an Order Incorporating into the Record Stipulation of the Parties, dated Apr. 19, 1974, was issued by the undersigned. By this Stipulation, the parties accepted respondent's definition of "reserve cooling power" for all purposes of this proceeding.

The parties have submitted proposed findings, supporting memoranda, and proposed orders. Respondent has also filed a reply brief. This proceeding is therefore before the undersigned based upon the complaint, as amended, the answers filed by respondent, the stipulations of the parties, the joint exhibit of the parties, the proposed findings and memoranda submitted by the parties, and respondent's reply brief. No witnesses were called to testify, and the exhibits of record are by stipulation. Thus, the basic facts herein are undisputed.

The submissions by the parties have been given careful consideration and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and include references to the principal supporting evidence in the record. Such references are intended to serve as convenient guides, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are set forth in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CPF - Proposed Findings of Fact, Conclusions of Fact And Law, And Order submitted by Complaint Counsel.

CM - Memorandum in Support of the Proposed Findings of Fact, Conclusions of Fact and Law, and Order submitted by Complaint Counsel.

RAFAC - Respondent's Answer to Further Amended Complaint.

RPF - Respondent's Proposed Findings of Fact and Conclusions of Law.

RB - Respondent's Brief to the Administrative Law Judge.

RO - Proposed Order submitted by Respondent.

RX - Respondent's Exhibits.

Jt. Stip. - Joint stipulation submitted by the parties. (This abbreviation will be followed by the number of the stipulation and the page number upon which the evidence being cited appears.)

Jt. Ex. - Joint Exhibit of the parties.

PHC Tr. - Transcript of the prehearing conferences, followed by the page number being referenced.

Tr. - Transcript of the formal hearing, followed by the page number being referenced.

FINDINGS OF FACT

Identity and Business of Respondent

1. Respondent Fedders Corporation, hereinafter sometimes referred to as "Fedders," is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at Edison, N.J. (Admitted, RAFAC, Par. 1).

2. Respondent Fedders is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders air conditioners, including Fedders room air conditioners (Admitted, RAFAC, Par. 1).

3. In the course and conduct of its aforesaid business, respondent

Fedders now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various States of the United States, and in the District of Columbia. Respondent Fedders therefore maintains, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted, RAFAC, Par. 1).

4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent (Admitted, RAFAC, Par. 1).

5. In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of its said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of its room air conditioners, including but not limited to, advertisements printed in newspapers located in various States of the United States and in the District of Columbia, which newspapers are disseminated across state lines (Admitted, RAFAC, Par. 1).

The Challenged Advertisements

6. Pursuant to a resolution of the Federal Trade Commission dated June 9, 1971, and amended July 7, 1971, entitled "Resolution Requiring Submission of Special Reports Relating to Advertising Claims and Disclosure Thereof by the Commission in Connection with a Public Investigation", 36 Fed. Reg. 12,058 (June 9, 1971), as amended, 36 Fed. Reg. 14,680 (July 7, 1971) (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 1, Appendix B, p. 1), on Sept. 30, 1971, the Commission ordered respondent Fedders to file a Special Report on specific advertising claims. One of the advertising claims for which the Commission requested documentation and other substantiation by Special Report was:

> RESERVE Cooling Power - only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days.

The information demanded was:

> All documentation and other substantiation for the claim that only the Fedders room air conditioner has extra cooling power that assures cooling on extra hot, extra humid days. (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 4.)

The specific advertisement questioned by the Commission's Special Report appeared in *The Monroe Morning World*, Monroe, Louisiana, June 10, 1971 (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 3).

7. Respondent filed its response to the Commission's Special Report on Dec. 22, 1971. In its response, Fedders admitted the lack of

substantiation for the claim that RCP was unique to Fedders. Respondent stated:

> As to claim that *only* Fedders has this reserve cooling power feature, we have found that this claim is not substantiated and do not propose to include it in any further advertising copy which we may promulgate. (Motion of Complaint Counsel For Summary Decision, Appendix B, p. 3.)

8. The advertisement set forth in the Commission's Special Report was incorporated in Paragraph Six of the complaint herein and was alleged in Paragraphs Seven and Eight of the complaint to be a uniqueness claim for Fedders room air conditioners, which is false and deceptive. Respondent has admitted that this advertisement represented, directly or by implication, that RCP is a unique feature of Fedders room air conditioners. Respondent further admitted that RCP, referring to ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners and that comparable room air conditioners made by some other companies have such ability and feature (RAFAC, pp. 1-2).

The complaint in Paragraph Eight alleges that RCP refers to "an increased cooling capacity at high loading conditions." The parties have stipulated that RCP refers to the "ability to function satisfactorily under conditions of extreme heat and humidity" (First Stipulation of the Parties; RAFAC, p. 2; Stipulation of the Parties dated Apr. 19, 1974). These meanings are essentially equivalent and any distinction between the two definitions is without significance in this proceeding.

9. By and through the use of the aforesaid statements and representations, respondent has represented, directly or by implication, that RCP is a unique feature of Fedders room air conditioners, not found in other room air conditioners (Admitted, RAFAC, p. 1). In truth and in fact, RCP, referring to an ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners. In fact, comparable room air conditioners made by some other companies function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, p. 2). Therefore the statements and representations that RCP is a unique feature of Fedders room air conditioners is false, misleading and deceptive.

10. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, Par. 5). In truth and in fact, at the time the

aforesaid statements and representations were made, respondent had no reasonable basis to support the representation that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, Par. 5). Therefore, the statements and representations were and are false, misleading and deceptive.

11. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, respondent had no reasonable basis from which to conclude that such was the fact (Admitted, RAFAC, Par. 5). Therefore, the statements and representations were and are false, misleading and deceptive.

12. The use by respondent of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

Respondent's Defenses

13. In its answers filed herein, including its Answer to Further Amended Complaint, respondent, as and for an affirmative defense, alleges that it, in good faith, many months prior to the issuance of notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to RCP and has not since resumed the dissemination of any such material. Respondent further alleged, as and for mitigating circumstances if the allegations in the complaint are sustained, that the advertising claim alleged in the complaint to be false, misleading or deceptive is only one of approximately ten advertising claims made by respondent as to which it was required by the Commission to furnish supporting material. Respondent furnished such material in respect to the other advertising claims in response to the Commission's order, and none of the other claims have been challenged by the Commission (RAFAC, pp. 3-4). Respondent further affirmatively averred in its Answer to Further Amended Complaint that the challenged statements and representations of uniqueness of RCP were so infrequently made and constituted

so small a percentage of respondent's advertising expenditures that its impact upon the purchasing public was insignificant (RAFAC, pp. 1-2).

Respondent's Expenditures for RCP Advertisements

14. In view of respondent's contentions concerning the insubstantiality of advertisements claiming uniqueness for RCP, the administrative law judge suggested there should be submitted for the record the total advertising expenditures, the total number of advertisements which utilized the term "reserve cooling power," the expenditures for those advertisements, the total number of advertisements which utilized a claim of uniqueness for "reserve cooling power," the total expenditures for those advertisements, as well as sample advertisements of both types. It was further suggested by the administrative law judge that such information could be based on a sample area (PHC, Tr. 70).

15. The sample areas agreed upon by the parties for the above purposes are as follows:

(1) The Florida Area:

This area, serviced during the years involved by Cain & Bultman, as distributor, comprised the entire State of Florida (except the extreme northwest portion thereof), and the eleven southeasternmost counties of the State of Georgia.

(2) The Washington, D.C. Metropolitan Area:

This area, serviced during the years involved by American Appliance Wholesalers, as distributor, consisted of the District of Columbia, together with thirteen Virginia counties and five Maryland counties in the surrounding area.

(3) The Philadelphia Metropolitan Area:

This area, serviced during the years involved by Samuel Jacobs Distributors, Inc. and its subsidiaries and affiliates, as distributors, consisted of the city of Philadelphia and nearby counties, of which twenty-one were in the State of Pennsylvania, eight in the State of New Jersey, and two in the State of Delaware.

(4) The New York Metropolitan Area:

This area, serviced during the years involved by L & P Electric Co., Inc. and its subsidiaries and affiliates, as distributors, consisted of New York City, Long Island, the eight southernmost counties of New York adjacent to New York City, thirteen counties in eastern and northern New Jersey, six counties in western and central Connecticut, and three counties in the southernmost part of Massachusetts (respondent's Response to Commission's Motion for Summary Decision, Exhibit 1 of the Pochick Affidavit; Tr. 88-90).

16. The time period agreed upon for the sample areas was the two

fiscal years of respondent ending Aug. 31, 1970 and Aug. 31, 1971, respectively (Second Stipulation of the Parties, p. 1; RFP, p. 9).

17. The parties stipulated that Fedders' total advertising expenditures for each fiscal year in each sample area for Fedders air conditioners of all types were approximately as follows (Second Stipulation of the Parties):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	$176,000	$245,000
Washington, D.C.	$35,000	$24,000
Philadelphia	$180,000	$118,000
New York	$860,000	$846,000

Of the above total, the following represents total advertising expenditures for each year in each sample area for cooperative newspaper advertising of Fedders room air conditioners (Second Stipulation of the Parties; Tr. 90):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	$90,036.04	$77,857.76
Washington, D.C.	$28,760.87	$6,717.95
Philadelphia	$99,810.15	$44,388.59
New York	$247,403.62	$142,313.53

The parties have stipulated that the total number of insertions of cooperative newspaper advertisements in each sample area were as follows (Second Stipulation of the Parties):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	1229	920
Washington, D.C	163	85
Philadelphia	985	309
New York	1997	1202

Further, the parties stipulated that the following represents the total number of cooperative newspaper advertisements claiming RCP and the total expenditures for such advertisements (Second Stipulation of the Parties; Stipulation of the Parties dated Apr. 19, 1974):

	Fiscal 1969-1970		Fiscal 1970-1971	
	Insertions	Expenditures	Insertions	Expenditures
Florida	252	$29,002.72	111	$15,067.38
Washington, D.C.	73	$10,987.70	25	$2,236.24
Philadelphia	291	$29,940.69	132	$17,409.14

New York	1487	$129,131.33	738	$48,266.75

The parties have stipulated that, of the above number of cooperative newspaper advertisements, the following number claimed uniqueness to Fedders of RCP followed by the expenditure for such advertisements:

	Fiscal 1969-1970		Fiscal 1970-1971	
	Insertions	Expenditures	Insertions	Expenditures
Florida	37	$2,899.38	35	$5,946.05
Washington, D.C.	9	$826.91	8	$371.93
Philadelphia	33	$4,876.74	9	$896.74
New York	33	$1,750.06	9	$701.90

18. On the basis of the above stipulated figures, respondent's expenditures for cooperative advertisements claiming uniqueness for RCP constitute the following ratio to total advertising expenditures and to total cooperative advertising expenditures:

	Total 2-yr. Expenditures	Total 2-yr. Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power	Ratio Expenditures For Advertisements Claiming Uniquiness For Reserve Cooling Power To Total Advertising Expenditures
Florida	$421,000	$8,845.43	2.1%
Washington, D.C.	59,000	1,198.84	2.03%
Philadelphia	298,000	5,773.48	1.94%
New York	1,706,000	2,451.96	.143%
	$2,484,000	$18,269.71	.736%

	Total 2-yr. Cooperative Advertising Expenditures	Total 2-yr. Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power	Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power To Total Cooperative Advertising Expenditures
Florida	$167,893.80	$8,845.43	5.27%
Washington, D.C.	$35,478.82	1,198.84	3.38%
Philadelphia	144,198.74	5,773.48	4.04%
New York	389.717.15	2,451.96	.63%
	$737,288.51	$18,269.71	2.47%

19. On the basis of the above stipulated figures, respondent's advertisements claiming uniqueness for reserve cooling power and advertisements not claiming uniqueness for reserve cooling power, and

the expenditures therefor, constitute the following ratio to the total number of cooperative advertisements utilized by respondent and the following ratio for the expenditures for such advertisements:

	Total Number Cooperative Advertisements 1969-1971	Total Number Cooperative Advertisements 1969-1971 Claiming Reserve Cooling Power	Total Number Cooperative Advertisements Claiming Uniqueness For Reserve Cooling Power
Florida	2149	363	72
Washington, D.C.	248	98	17
Philadelphia	1294	423	42
New York	3199	2225	42
TOTAL	6890	3109	173

	Ratio Advertisements Claiming Uniqueness For Reserve Cooling Power To All Reserve Cooling Power Advertisements 1969-1971
All Areas	5.56%

	Total Expenditures For Advertisements Claiming Reserve Cooling Power 1969-1971	Total Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power 1969-1971
Florida	$ 44,070.10	$8,845.43
Washington, D.C.	13,223.94	1,198.84
Philadelphia	47,349.83	5,773.48
New York	177,398.08	2,451.96
	$282,041.95	$18,269.71

	Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power To All Reserve Cooling Power Advertisements 1969-1971
All Areas	7.8%

20. In the Florida subarea, the majority of the advertisements with unique RCP claims were in newspapers with circulations of less than 50,000. However, there were several advertisements placed in newspa-

pers with daily circulation figures in excess of 170,000. In the Washington, D. C. subarea, most of such insertions were in small publications, none with a circulation of over 30,000 and most under 12,000. In the Philadelphia subarea, roughly one-half of the insertions were in small town or small city publications, with circulations of under 100,000. Several advertisements appeared in the *Philadelphia Inquirer* with a daily circulation of over 450,000. In the New York City subarea, all of the insertions were in small town or small city newspapers, the largest with a circulation of 66,000. Examination of the texts of these advertisements discloses that the unique RCP claim was featured in only a minority of the advertisements (RX 1).

21. The parties hereto have further stipulated that respondent's expenditures for advertising which claimed "reserve cooling power" were, with insignificant exceptions (the cost of certain store display cards and the imprints on certain factory cartons), confined to the aforesaid cooperative advertisements (Stipulation of the Parties dated Apr. 19, 1974).

Respondent's Advertisements Not Claiming Uniqueness For Reserve Cooling Power

22. Complaint counsel contend that Fedders' advertisements, referring to RCP without claiming uniqueness, suggested the superiority of the feature with language similar to that used in the uniqueness claims. Samples of advertisements selected by complaint counsel and respondent as representative of such advertisements are contained in the record (Second Stipulation of the Parties, Attachment A). These advertisements, while not claiming uniqueness for "reserve cooling power," state the following with respect to "reserve cooling power:"

> RESERVE COOLING POWER * * * it's Fedders engineering "extra" which gives maximum cooling even when sunload reaches 115 degrees* * * and other units fail!
>
> Fedders Sound Barrier models - as close to perfect as an air conditioner can get * * * plus Reserve Cooling Power for extra cooling strength.
>
> You get Reserve Cooling Power for extra hot, extra humid days.
>
> PLUS RESERVE COOLING POWER, TOO (for extra hot, humid days).
>
> And you get: Reserve Cooling Power for extra hot, humid days; * * *.

23. Complaint counsel introduced no evidence to establish consumer perception of the representations contained in respondent's advertisements, or that there were latent or implied messages in the statements. The administrative law judge must therefore exercise his own judgment as to the representations, express or implied, contained in respondent's advertisements.

24. These advertisements, which state that "reserve cooling power"

is an "extra" or is a feature designed for extra hot, humid days, or gives extra cooling strength, do not claim such feature is *unique* with Fedders room air conditioners. The only advertisement which contains a comparative claim is the first representation set forth above, which states that "reserve cooling power" is a Fedders engineering "extra" which gives maximum cooling even when sunload reaches 115 degrees, and other units fail. This is a comparative representation, but it does not compare Fedders room air conditioners with *all* other room air conditioners.

25. The complaint challenges as unlawful Fedders' statements and representations that "reserve cooling power" is "a unique feature of Fedders room air conditioners" when such was not a fact (Paragraphs Seven and Eight); that, by and through the uniqueness claim, Fedders represented, directly or by implication, that Fedders had a reasonable basis from which to conclude the Fedders room air conditioners had a significantly increased ability to function satisfactorily under conditions of extreme heat and humidity when compared with all other room air conditioners, when in fact Fedders had no reasonable basis for making such claim (Paragraphs Nine and Ten); and that, by and through the use of the uniqueness claim, Fedders also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly increased ability to function satisfactorily under conditions of extreme heat and humidity when Fedders had no reasonable basis to conclude that such was the fact (Paragraph Eleven). Thus, the unlawful representations made by Fedders, which are challenged in the complaint, arise from the "uniqueness" claim for Fedders air conditioners, as set forth in Paragraph Six of the complaint.

26. A "uniqueness" claim necessarily connotes a comparison with all other air conditioners, unless the literal wording of the complaint warrants some other interpretation (see *ITT Continental Baking Company, Inc., et al.*, Docket No. 8860, Opinion of the Commission, dated Oct. 19, 1973, Slip Op., pp. 14-15 [83 F.T.C. 947, 957]). In fact, the administrative law judge amended the complaint allegations in this matter to specifically state that the uniqueness representations of superiority were to be measured against all other room air conditioners (PHC Tr. 48-49; Order Further Amending Complaint, Jan. 10, 1974). The administrative law judge therefore concludes that the representative advertisements of Fedders room air conditioners, which utilize "reserve cooling power," but which do not claim uniqueness for this feature, are not challenged in the complaint.

27. The stipulated advertising figures in the record establish that 45.1 percent of respondent's cooperative advertisements utilize RCP

representations, and 2.51 percent of respondent's cooperative advertisements claim uniqueness for RCP. Of all advertisements claiming RCP, 5.56 percent thereof claim uniqueness. As far as expenditures are concerned, 2.47 percent of total cooperative advertising expenditures were for advertisements claiming RCP. Of expenditures for advertisements claiming RCP, 7.8 percent thereof was expended for advertisements claiming uniqueness for RCP. In view of the small percentage of advertisements claiming uniqueness for RCP and the small percentage of expenditures for advertisements claiming uniqueness for RCP in relation to respondent's total advertising program involving RCP claims, the administrative law judge concludes, in the absence of any evidence presented by either party bearing on this issue, that there was no carry-over effect on consumers from advertisements claiming uniqueness for RCP to advertisements merely claiming RCP. The record is silent as to the type of in-store display cards utilized, or the extent of their use (see Finding 21).

Respondent's Discontinuance Defense

28. When Fedders responded to the Commission's Special Report on Dec. 22, 1971, it stated as follows:

> As to the claim that *only* Fedders has this reserve cooling power feature, we have found that this claim is not substantiated and do not propose to include it in any further advertising copy which we may promulgate (Motion of Complaint Counsel for Summary Decision, Appendix B, p. 3; Jt. Ex. 1).

Also, on Dec. 22, 1971, Fedders sent a bulletin to all of its distributors advising that "Old powerful selling friends like 'Reserve Cooling Power,' 'multi-room cooling,' 'cools three rooms, even a small home,' 'installs in minutes,' 'germicidal filter' are no longer." Distributors were further advised that they are not to use any of the advertisements provided in 1971 and earlier years. Distributors are requested to advise dealers that advertisements must not make any claims for the Fedders product that are not made in Fedders' supplied 1972 materials (Jt. Ex. 1 H).

This bulletin does not acknowledge that "reserve cooling power" claims were untrue, or were capable of misleading customers, or could not be proved or substantiated. Instead, the bulletin states that Fedders is "eliminating every phrase that could possibly be questioned by the FTC" (Jt. Ex. 1 H). The bulletin also indicates that "reserve cooling power," along with the other advertising representations, are being eliminated "not that they are not provable or that they are misleading, but simply because the explanation and qualifications that would have to be included in each ad would take up too much space" (Jt. Ex. 1 H).

29. An affidavit by Harold Boxer, Director of Merchandising of Fedders, which is attached to respondent's Response to Commission's

Motion for Summary Decision, stated that the Fedders advertising department in or about 1964 or 1965 coined the phrase "reserve cooling power" as an expression of the operating characteristics under extreme temperatures of Fedders room air conditioners, and the words had been featured in Fedders' advertising through 1971.

30. In an affidavit attached to respondent's Response to Commission's Motion for Summary Decision, Paul C. Anderson, Advertising Manager for room air conditioners of Fedders, stated that all references to "reserve cooling power" were completely dropped from Fedders' advertising in Dec. 1971 and that those words have not been used by Fedders in the preparation of further advertising matter.

31. Sam Muscarnera, House Counsel for Fedders, has submitted an affidavit dated Apr. 15, 1974, which has been received into the record by stipulation of counsel for the parties (Jt. Ex. 1 C-G). Mr. Muscarnera has set forth the steps taken by Fedders in order to maintain firmer control, insofar as possible, over advertising. Mr. Muscarnera also stated that "the likelihood of Fedders' repetition of the offending practices charged is exceedingly remote" (Jt. Ex. 1 G).

32. The Commission served its Order to File Special Report calling for advertising substantiation on respondent on Oct. 15, 1971; notice of a proposed adjudicative hearing was served on respondent on Oct. 12, 1972; and the formal complaint herein issued on June 11, 1973 (RPF, p. 7).

33. There is no evidence in the record indicating that any claims for "reserve cooling power" have been disseminated since Dec. 22, 1971 (Jt. Ex. 1 A-E).

34. "Climatrol" brand room air conditioners are manufactured by Fedders, and marketed through a wholly-owned subsidiary known as Mueller Climatrol Corp. An advertisement for "Climatrol" central air conditioners appeared in the Mar. 4, 1974 issue of *Newsweek* magazine which claimed, among other things, that the rotary compressor of the unit was "exclusive." This advertisement was called to Fedders' attention by complaint counsel, who questioned the use of the word "exclusive" by Climatrol in light of the fact that similar products are manufactured and marketed by Fedders under the "Fedders" brand. Fedders has maintained, in an affidavit submitted by Mr. Muscarnera, that Mueller Climatrol Corp., in contrast to the great majority of Fedders' subsidiaries and divisions, is semi-autonomous, and its sales and advertising staff operate independently of the advertising organization and personnel of Fedders. Consequently, up to the time the above advertisement appeared, Mueller Climatrol Corp., had not cleared its advertising through Fedders, as had other Fedders divisions. Mueller Climatrol had previously been advised by Fedders to

avoid the use of the word "exclusive" in any context whenever possible, and, accordingly, as early as Oct. 15, 1973, had substituted the word "exciting" for the word "exclusive" as applied to the rotary compressor (Jt. Ex. 1 F).

35. While the exclusivity of the rotary compressor in the residential central air conditioning field is not challenged in this proceeding, the use of the word "exclusive" as to "Climatrol" brand units could, from a technical standpoint, create confusion in consumers' minds unless accompanied by appropriate explanatory material (Jt. Ex. 1 F). This incident is of significance to this proceeding in view of respondent's discontinuance argument, since it clearly indicates that Fedders had not taken appropriate steps, at least as of Oct. 1973, to prevent the promulgation of false or deceptive advertisements by all its subsidiaries and divisions because Climatrol advertisements were not cleared through Fedders as of that date. In fact, it appears that as late as Mar. 1974, Fedders' divisions and subsidiaries were utilizing advertisements containing representations which had not been reviewed and cleared by responsible Fedders officials.

CONCLUSIONS

The complaint, as amended by the administrative law judge, charges that respondent represented that reserve cooling power is a unique feature of Fedders room air conditioners, not found in other room air conditioners, and that, in fact, reserve cooling power is not unique as to Fedders room air conditioners. The complaint, as amended, also charges respondent with representing that it had a reasonable basis for the claim that reserve cooling power is unique with Fedders room air conditioners and that, in fact, respondent had no such reasonable basis for such representation. The amended complaint further charges that by use of the uniqueness claim, respondent represented that its room air conditioners operated in a way superior to the functioning of other room air conditioners, and that such is not a fact.

In its Answer to Amended Complaint, respondent admitted making these representations, that it had no reasonable basis therefor, and that there was no basis in fact for the representations. Therefore, all allegations of unlawful conduct charged in the complaint have been admitted. Under the doctrine pronounced by the Commission in *Pfizer*, "* * * it is an unfair practice in violation of the Federal Trade Commission Act to make an affirmative product claim without a reasonable basis for making that claim." *Pfizer, Inc.*, Docket 8819, Opinion of the Commission, 81 F.T.C. 23, 62 (1972).

Thus, the only issues remaining after the pleadings are whether these admittedly unlawful acts and practices have the tendency and capacity to mislead a substantial portion of the purchasing public; whether discontinuance is a defense to an order in this proceeding; and whether respondent's conduct was sufficiently serious to support an order.*

DISCONTINUANCE

It is undisputed that claims relating to reserve cooling power have been discontinued. The circumstances surrounding discontinuance, set forth hereinafter, are likewise undisputed.

The advertising campaign for reserve cooling power was of lengthy duration, beginning at least in the mid-sixties and continuing until late 1971, the date of the discontinuance. The extended usage of the claims is a strong indication of the importance of said claims to the advertising strategy followed by respondent. Respondent has referred to the reserve cooling power advertising claims as an "[O]ld powerful selling friend(s)" (Jt. Ex. 1 H).

The discontinuance of reserve cooling power claims in late 1971 cannot be considered to have been a voluntary action. The record establishes that the discontinuance occurred as a direct result of respondent's awareness of the Commission's investigation of its advertising. The record clearly demonstrates that it was only during the preparation of the response to the Commission's Special Report that respondent made the decision to discontinue the uniqueness claim, as well as the more general claim regarding reserve cooling power. It was not until the same date that respondent filed its response to the Special Report with the Commission that it warned its distributors to stop making any reserve cooling power claims. "In other words, respondent stopped violating the law when it learned that the law's hand was already on its shoulder, * * *." *Coro, Inc., et al.*, Docket 8346, Opinion of the Commission, 63 F.T.C. 1164, 1201 (1963).

" 'That discontinuance of an unlawful practice, of itself, does not necessarily preclude the issuance of a cease and desist order is so well settled as to preclude further argument.' " *Giant Food, Inc.*, Docket 7773, Opinion of the Commission, 61 F.T.C. 326, 356 (1962), citing *Marlene's Inc.* v. *F.T.C.*, 216 F.2d 556, 559 (7th Cir. 1954). Further, the courts have consistently recognized the propriety of a cease and desist order when, as in this case, the discontinuance was not entirely voluntary. *Galter* v. *F.T.C.*, 186 F.2d 810, 812, 813 (7th Cir. 1951), *cert. den.* 342 U.S. 818 (1951); *Eugene Dietzgen Co.* v. *F.T.C.*, 142 F.2d 321, 330 (7th Cir. 1944), *cert. den.* 323 U.S. 730 (1944). Thus, the fact that respondent's discontinuance is directly attributable to the Commission's investigation must be given substantial weight when judging the merits of respondent's discontinuance.

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* In its reply brief respondent states: "The central issues are two: first, whether under all the circumstances here involved, the complaint should be dismissed by reason of Respondent's discontinuance of the offending practice, and second, if the complaint is not dismissed, whether Complaint Counsel's Proposed Order * * * is impermissibly broad" (Reply Brief, pp. 1-2).

The First Circuit in *Coro, Inc.* v. *F.T.C.*, 338 F.2d 149, 153 (1964), *cert. den.* 380 U.S. 954 (1965), in upholding a Commission cease and desist order based on a showing of unfair and deceptive practices used in only one percent of the business solicited by a respondent which had no prior record of violations of the Federal Trade Commission Act, found the following circumstances which it said negated the respondent's defense of discontinuance:

> But Coro gave the line of business up only after the Commission had started to investigate its practices therein and only a few months before the Commission filed its complaint, and we have only the current corporate officers' expression of intention not to resume the business. Coro has not disposed of its plant. It is still in the costume jewelry business and there is nothing to suggest that it does not intend to continue in that general industry.

The facts in the present case closely resemble the circumstances found by the Court in *Coro*. Respondent continues to sell air conditioners, continues to advertise air conditioners, and could resume making deceptive advertising claims at any time in the future. The only special circumstance demonstrated by respondent is affidavits submitted by corporate officials.

The steps taken by respondent's officials to insure that future advertising violations will be avoided appear less than satisfactory. The record shows that one of respondent's subsidiaries has as recently as Mar. 1974, long after the complaint herein had issued, widely disseminated a questionable uniqueness claim for an important performance characteristic of an air conditioner. In a joint exhibit, Mr. Muscarnera, respondent's in-house counsel, stated in an affidavit that a recent advertisement in a national news weekly magazine for a central air conditioner manufactured by Fedders, but sold under the Climatrol label, made a claim of exclusivity for Climatrol's rotary compressor, when central air conditioners sold under the Fedders label also have the exact same feature. Most importantly, Mr. Muscarnera admitted that he was unaware of the dissemination of this particular advertisement until it was recently brought to his attention by complaint counsel.

The philosophy on which the Commission's Ad Substantiation Program is based, is that corporations must strive to exercise a higher level of responsibility than previously, by *assuring* themselves that *before* they disseminate an advertising claim, sufficient substantiation exists to constitute a reasonable basis as to the validity of such claim. *Pfizer, Inc., supra.* The administrative law judge is definitely in accord with the holding in *Pfizer*. Clearly, respondent's admission of dissemination of a performance claim for its room air conditioners over a period of several years without having a reasonable basis therefor demonstrates a deficiency in the maintenance of the required standard of corporate responsibility in the past. Moreover, despite respondent's assurances of future discontinuance of this type of objectionable conduct, and recitation of precautions taken to prevent such future recurrences, the Mar. 1974 Climatrol advertisement suggests that respondent's officers have failed to exercise adequate precautions to prevent respondent's unsubstantiated advertising claims.

Therefore, the administrative law judge is of the opinion that a cease and desist order is both necessary and proper in this proceeding. Without an order, the public has no definite assurance that the unlawful practices will not be resumed at some time in the future. *Fairyfoot Products Co.* v. *F.T.C.*, 80 F.2d 684, 686-687 (7th Cir. 1935).

Respondent's Defense Based on Insubstantiality

Respondent argues that the impact of the offending advertising claims upon the purchasing public could not have been substantial, in light of the limited circulation of the media in which the advertisements containing such claims were placed, the relatively few insertions involved, the small expenditures involved and their insignificance in relation to respondent's total advertising effort, and the fact that in most instances such claims were not featured in the advertisements in which they appeared, but were included merely as one of a considerable number of other claims (RB, p. 8).

In the present case, respondent considered the claims for reserve cooling power as a significant selling device—an old powerful selling friend (Jt. Ex. 1 H). The representation was utilized for several years, and was discontinued only when questioned by the Commission. The advertisement represented that *only* Fedders gives assurance of cooling on extra hot, extra humid days. Such a representation is the raison d'etre for an air conditioning unit—it is an extremely material representation. Thus, there can be no question that the challenged claims for this major feature were material.

Even when a claim is material, the Commission has at times chosen not to issue an order when it has found the violation to be so minor as to be *de minimis*. The doctrine is usually applied, however, where it appears the violation was an isolated, unintentional act, unlike the offender's usual practices. The Commission has been reluctant to invoke the *de minimis* doctrine, particularly in the case of advertising violations, and has in the past held one or a few advertisements to be sufficiently serious to justify the issuance of an order in the public interest (see *F.T.C.* v. *Colgate-Palmolive Co., et al.*, 380 U.S. 374, 395 (1965) (3 advertisements); *Gimbel Bros., Inc.* v. *F.T.C.*, 116 F.2d 578, 579

(2d Cir. 1941) (advertisements published twice); *Gimbel Bros.*, 60 F.T.C. 359 (1962) (one advertisement), *appeal dismissed*, 7 S.&D. 549 (3d Cir. 1962); and *Baldwin Bracelet Corp., et al.*, 61 F.T.C. 1345, 1363 (1962), *aff'd* 325 F.2d 1012 (D.C. Cir. 1963), *cert. den.* 377 U.S. 923 (1964)).

As the following figures show, this case deals not with an isolated incident, but with many different advertisements, each containing a deceptive representation, inserted in many newspapers, presumably on a national scale. Considering only the sample areas over the designated period of two years, there were the following numbers of insertions of advertisements claiming uniqueness of reserve cooling power: 72 insertions in Florida, 17 in Washington, D.C., 42 in Philadelphia, and 42 in New York, for a total of 173 insertions.

Respondent emphasizes that only 3/4 of 1 percent of its total advertising expenditures in the sample areas was spent on reserve cooling power uniqueness claims, and of that total the expenditures for cooperative advertising bearing uniqueness claims in relation to total cooperative advertising expenditures had a ratio of only 2 1/2 percent; and that only $18,269 was spent on cooperative advertising utilizing uniqueness claims during the two-year period in the sample areas (RPF, pp. 8-16). Respondent would thus conclude that the offending claims did not have the tendency and capacity to mislead a substantial portion of the purchasing public (RPF, p. 16).

The record does not show what proportion of national sales or advertising the sample areas constitute. Therefore, an accurate projection of the total number of insertions of offending advertisements is impossible. The record does show that reserve cooling power claims were run over a period of several years, although the record does not show what form the advertisements took or whether uniqueness claims were utilized. However, if the two-year period examined were typical of what occurred on a national scale, which the sampling device presupposes, we can safely speculate that the total numbers of deceptive uniqueness advertisements may have run well into the thousands and expenditures therefor into the hundreds of thousands of dollars.

Respondent's argument merely establishes that the challenged advertising constituted a small portion of respondent's total advertising program; it does not establish that the false advertising claims were without impact on the public. Clearly, the violation, concerning a material claim broadly disseminated, involving hundreds, perhaps thousands of newspaper advertisements, cannot be regarded as *de minimis*. The administrative law judge finds the language of the Commission in the *Baldwin Bracelet* matter particularly appropriate: "* * * we are not prepared to say that deception is all right if practiced in moderation." (61 F.T.C. 1363). Nor is deception permissible if practiced in small town newspapers of limited circulation (Reply Brief, p. 17). The Act also includes within its protection residents of small towns (see *Charles Of The Ritz Dist. Corp.* v. *F.T.C.*, 143 F.2d 676, 679 (2d Cir. 1944)).

The administrative law judge concludes, therefore, that respondent's dissemination of uniqueness representations for reserve cooling power, which were not in fact true and substantiated, constituted a substantial practice involving a material performance claim. Accordingly, these representations had the tendency and capacity to mislead a substantial portion of the purchasing public and are of such a magnitude as to warrant a cease and desist prohibition.

THE REMEDY

It is well settled that the Commission may, and should, enter an order of sufficient breadth to insure that a respondent will not engage in future violations of the law. To this end the Commission has wide discretion in fashioning an appropriate order. See *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608, 611-13 (1946); *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *F.T.C.* v. *National Lead Co.*, 352 U.S. 419, 428-30 (1957); *F.T.C.* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). Commission orders have been consistently upheld whenever the orders are reasonably related to the unlawful practices found to exist and are clear and precise so that they may be understood by those against whom they are directed. *Jacob Siegel, supra*, at 611-13; *Ruberoid, supra*, at 473; *F.T.C.* v. *Cement Institute*, 333 U.S. 683, 726 (1948).

The Commission, within this framework, may reasonably ban the precise practice found to violate the Federal Trade Commission Act, and may enjoin "like and related" practices. *F.T.C.* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392-393 (1959); *Niresk Industries, Inc.* v. *F.T.C.*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. den.* 364 U.S. 883 (1960); *Consumers Products of America, Inc., et al.* v. *F.T.C.*, 400 F.2d 930, 933 (3d Cir. 1968), *cert. den.* 393 U.S. 1088 (1969). Further, a respondent "caught violating the Act must expect some fencing in." *F.T.C.* v. *National Lead Co., supra*, at 510. While recognizing that it would be inappropriate to narrow the scope of the order to the precise misrepresentation made (uniqueness of a single characteristic, namely, "reserve cooling power"), respondent submits that it is entirely fitting and proper for the order to be confined to unfounded claims of uniqueness of any attribute or characteristic. Respondent contends that the notice order, embracing as it does all "performance characteristics" of any Fedders air conditioners, "is completely impermissible" (RB, pp. 14-15).

The form of order served with the complaint would prohibit uniqueness claims of any kind and misrepresentations of performance characteristics of any kind. The notice order also provides for record keeping. Complaint counsel have made minor changes in their proposed form of order from the form of order served with the complaint.

The order entered by the administrative law judge herewith prohibits respondent from making any uniqueness claims. It would also prohibit the making of any representation as to a performance characteristic of any air conditioner unless, at the time of the making of the representation, respondent had a reasonable basis for such representation. The order entered herewith also requires that records of the documentation in support of performance claims be maintained for three (3) years after such claims are made and that such records be made available to the Commission upon reasonable notice. The recordkeeping provision is limited to ten (10) years from the date the order becomes final. Thus, the administrative law judge has basically adopted the proposed order served with the complaint and recommended by complaint counsel, with minor changes which are without substantial substance such as combining specific prohibitions into the broader prohibition.

Respondent has admitted disseminating a false performance claim for its room air conditioners relating to the uniqueness of the ability of its room air conditioners to function satisfactorily at conditions of extreme heat and humidity. Respondent seems to acknowledge (RB, p. 15) that the order may properly extend beyond the confines of this one misrepresentation. The administrative law judge is of the opinion the order should prohibit respondent from making *any* performance claim for its air conditioners unless it possesses adequate substantiation for the claim at the time the representation is made. The Commission has recognized the propriety of orders governing all performance characteristics. *The Firestone Tire and Rubber, Co.*, Docket 8818, 81 F.T.C. 398, 475 (1972) *aff'd* F.2d 246, 250 (6th Cir. 1973), *cert. den.* 42 U.S.L.W. 3362 (Dec. 18, 1973). This provision of the order simply states explicitly the requirement already recognized by *Pfizer:* the possession of a reasonable basis for any material claim at the time the claim is disseminated. Because this provision simply sets forth a presently-existing obligation, it imposes little additional burden upon respondent, even extending it to all air conditioners.

The recordkeeping provision requires respondent to keep, and make available to the Commission, those materials which constitute substantiation for any performance claims which may be made. These are the same materials which the Commission is presently empowered to demand in Section 6(b) Orders to File Special Reports. Consequently, the recordkeeping provision, also an existing duty, reasonably incorporates all air conditioners. The only requirement included in this provision not previously spelled out by the Commission is that respondent retain such substantiation materials for three years, and this specific time requirement is not burdensome.

The requirement of record retention is the best possible method of preventing the recurrence of unsubstantiated claims. The requirement imposes little additional burden upon a respondent, which must, according to *Pfizer*, possess the materials at the time the claim is disseminated. At the same time, the retention will expedite Commission examination of the materials as soon as it suspects an unsubstantiated claim may have been or is about to be disseminated (after reasonable notice to respondent).

The Commission, as affirmed by the Sixth Circuit Court of Appeals, recognized the usefulness of a recordretention provision in the recent case, *Firestone Tire and Rubber Co., supra*, 481 F.2d at 250. In that case, the identical three-year retention provision as proposed herein, was ordered and affirmed.

Accordingly, the order entered herewith is believed to be both appropriate and necessary to prevent future violations of the law.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the respondent and this proceeding is in the public interest.

2. Respondent Fedders Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Edison, N.J.

3. Respondent Fedders Corporation is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders room air conditioners. In the course and conduct of its aforesaid business, respondent Fedders Corporation now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various States of the United States, and in the District of Columbia. Respondent Fedders Corporation therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders Corporation has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent.

5. In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of the said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of said room air conditioners, including but not limited to, advertisements printed in newspapers located in various States of the United States and in the District of Columbia, which newspapers are disseminated across state lines. Typical of the statements and representations contained in said advertisements is the following segment of the print advertisement for Fedders room air conditioners:

> RESERVE Cooling Power - only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days.

6. By and through the use of the aforesaid statements and representations, respondent has represented, directly or by implication, that reserve cooling power is a unique feature of Fedders room air conditioners, not found in other room air conditioners. In truth and in fact, "reserve cooling power," referring to the ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners. In fact, comparable room air conditioners made by other companies function satisfactorily under conditions of extreme heat and humidity. Therefore, such statements and representations were and are false, misleading and deceptive.

7. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that the Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. In truth and in fact, at the time the aforesaid statements and representations were made, respondent had no reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. Therefore, the statements and representations were and are false, misleading and deceptive.

8. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. At the time said statements and representations were made, respon-

dent had no reasonable basis from which to conclude that such was the fact. Therefore, the statements and representations were and are false, misleading and deceptive.

9. The use by respondent of the aforesaid false, misleading and deceptive acts and practices have had, and now have, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

10. The aforesaid acts or practices of respondent, as herein found, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

ORDER

It is ordered, That respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of air conditioners do forthwith cease and desist from:

1. Representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any material respect, unless such is the fact;

2. Making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to the performance characteristics of any air conditioner including, but not limited to, air cooling, heating, cleaning, circulation, dehumidification or humidification, efficiency and quietness of operation, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

3. Failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the performance characteristics (including but not limited to air cooling, heating, cleaning, circulation, dehumidification or humidification, efficiency and quietness of operation) of, or the uniqueness of any feature of, any of respondent's air conditioners;

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of Paragraph 3 hereof shall be in effect for a period of ten (10) years from the date this order becomes final.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after the effective date of the order, file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with this order.

FINAL ORDER

JANUARY 14, 1975

This matter having been heard by the Commission upon the appeal of respondent's counsel from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having denied the appeal:

It is ordered, That the initial decision of the administrative law judge, pages 1-30 [pp. 42-65 herein], is adopted as the Findings of Fact and Conclusions of Law of the Commission, except insofar as certain comments on pages 29-30 [pp. 63-65 herein] are inconsistent with the conclusions on pages 5-6 [pp. 73-74 herein] of the accompanying opinion, and subject to the following changes:

P. 2, line 4, [p. 43, line 2 herein] omit "that"

P. 3, line 9, [p. 43, fifth paragraph herein] word 4 "asserting"

P. 15, [p. 53 herein] substitute 6.5 percent for 7.8 percent

P. 18, line 36, [Finding No. 27, pp. 55-56 herein] substitute 6.5 percent for 7.8 percent

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order be entered:

ORDER

It is ordered, That respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of air conditioners, do forthwith cease and desist from:

1. Representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any material respect, unless such is the fact;

2. Making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to the air cooling, dehumidification, or circulation characteristics, capacity or capabilities of any air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which shall consist of competent scientific, engineering or other similar objective material or industry-wide standards based on such material;

3. Failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the air cooling, dehumidification, or circulation characteristics, capacity, or capability of, or the uniqueness of any feature of, any of respondent's air conditioners;

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of paragraph 3 hereof shall be in effect for a period of ten (10) years from the date this order becomes final.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after the effective date of the order, file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with this order.

OPINION OF THE COMMISSION

JANUARY 14, 1975

BY DIXON, Commissioner:

The complaint in this matter was issued on June 11, 1973, and charged respondent with dissemination of false and misleading advertisements in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). In particular the complaint alleged that respondent had represented through advertisements in newspapers of interstate circulation that (1) "reserve cooling power"[1] is a unique feature of its room air conditioners, not found in other room air conditioners; (2) Fedders' room air conditioners compared with all other room air conditioners have a significantly increased cooling capacity at high loading conditions under customary conditions of use; and (3) Fedders had a reasonable basis for concluding that its product compared with all other room conditioners has said increased cooling capacity. Drawing on a brief record consisting of stipulations, joint exhibits, and a few respondent's exhibits,[2] the administrative law judge sustained the complaint and recommended entry of an order. On appeal respondent has taken essentially the same position as it took before the administrative law judge, conceding the falsity of, and absence of reasonable basis for, the challenged representations but raising so-called affirmative defenses of "abandonment" and "insubstantiality," and arguing in the alternative that the order should be diminished in scope. We find the affirmative defenses to be patently without merit, as did the administrative law judge, but we believe that a slight modification of the order he has proposed is appropriate.

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[1] Hereinafter sometimes "RCP," stipulated by the parties to mean "ability to function satisfactorily under conditions of extreme heat and humidity." (I.D. 8)

The following abbreviations are used herein:

I.D.-Initial Decision (Finding No.)

I.D. p.-Initial Decision (Page No.)

RB-Respondent's Appeal Brief (Page No.)

I. Insubstantiality

Respondent argues that it should be absolved from any liability in this matter because the number of offending advertisements constituted only a small percentage of respondent's total advertising expenditures. Evidence submitted by respondent indicated that in four sample areas, New York, Philadelphia, Washington, D.C., and Florida, during the sample two-year period ending Aug. 31, 1971, the number of untruthful advertisements totaled 173 or 5.8 percent of all advertisements for reserve cooling power, and expenditures on such advertisements were $18,269 or 6.5 percent of all expenditures for advertisements touting RCP. (I.D. 17, 18) Respondent asserts in its appeal brief that the sample area accounted for "at least 35 percent" of its total United States' sales and advertising expenditures for the sample period.[3] Whatever the total number of offending advertisements may have been, it is clear to us that evidence from the sample area alone was quite sufficient to destroy whatever weight might be accorded respondent's defense of insubstantiality.

The Commission has previously issued orders in cases involving no more than one or a few deceptive advertisements. [See *Gimbel Bros.*, 60 F.T.C. 359, 368 (1962), *appeal dismissed per stipulation*, No. 14019 (3d Cir. Oct. 8, 1962) *unreported; Gimbel Bros., Inc.* v. *FTC*, 116 F.2d 578, 579 (2d Cir. 1941).] Here, in an area apparently accounting by respondent's estimate for far less than half of all its sales, 173 separate false advertisements were disseminated over a two-year period. This was 173 more than the law allows, and far more than warrant an appeal to the discretion of the Commission to omit an order in a litigated case. The fact that these advertisements constituted only a small percentage of respondent's total advertising program is wholly irrelevant. It merely demonstrates the truism that a larger advertiser inevitably has more opportunities than a smaller one to engage in deceptive practices. Similarly, we are entirely unimpressed with the fact that the offending advertisements appeared in non-urban newspapers with less circulation than metropolitan dailies. We are pleased to note, however, that respondent does not maintain that "deception is all right if practiced in moderation" nor that "deception is permissible if practiced in small town newspapers of limited circulation" (RB 13-14), though the learned administrative law judge may be excused for having received the contrary impression. (I.D. p. 27 [pp. 62-63 herein]) In all events the magnitude of the false advertising in this case cannot constitute an affirmative defense to the allegations of the complaint, nor does it give any reason to think that an order is not required to remedy the violation.

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[2] In describing the record in this case, the administrative law judge neglected to make reference to certain exhibits submitted by respondent separately (I.D. p. 5, third full paragraph [p. 45, fifth paragraph]). There is no indication, however, that the administrative law judge did not actually consider these exhibits in fashioning his decision, and in any event the Commission has fully considered said exhibits in its own review of the record.

[3] RB 13. The administrative law judge, noting that advertisements for RCP had been run for several years prior to the sample period, concluded that the actual number of offending advertisements may have totaled in excess of 1,000. (I.D. p. 27 [p. 62 herein]) Respondent challenged this extrapolation, though it did agree to use a sampling procedure. The parties apparently disagree as to whether the sample may be taken as representative of Fedders' advertising during the entire period in which RCP advertisements were run, or simply as representative of Fedders' advertising throughout the country for the sample two-year period. Resolution of this disagreement is not necessary for our decision.

II. Abandonment

Respondent further argues that it abandoned the offending practice in late 1971. It was stipulated at trial that RCP advertising was discontinued at this time, following determination by respondent, in response to an advertising substantiation order served on it by the Commission, that claims for the uniqueness of RCP could not be substantiated. The Commission has been properly parsimonious, if not totally unyielding, in its adjudicative recognition of the defense of abandonment, and courts have been reluctant to vacate Commission orders on those grounds except in the most extreme circumstances not present here, such as where a corporate respondent had exited from the relevent line of business under circumstances in which reentry seemed improbable. *National Lead Co.* v. *FTC*, 227 F.2d 825, 839, *et seq.* (7th Cir. 1955), *reversed in other respects*, 352 U.S. 419 (1957). Certainly the mere discontinuance of an offending practice in the face of inquiry by a law enforcement agency can under no circumstances be argued to amount to a defense. It is undisputed that respondent did not discontinue the challenged advertising until it had received an Order to File Special Report, requesting substantiation for the false representation. The situation is in essence no different from that in *Coro, Inc.*, 63 F.T.C. 1164 (1963), *aff'd* 338 F.2d 149 (1st Cir. 1964), *cert. denied* 380 U.S. 954 (1965), upon which the administrative law judge relied. While it is true that the mere issuance by the Commission of an advertising substantiation order is not meant to imply that the recipient is suspected of wrongdoing, it is also clear that an order to file this special report pursuant to Section 6(b) of the F.T.C. Act is an investigatory tool of the Commission, just as much as a subpoena issued pursuant to Section 9 of the Act, and having received such an order Fedders' subsequent discontinuance can hardly be viewed as being borne of spontaneous recognition of the error of its ways. Respondent disseminated plainly false advertisements for at least two years, discontinuing them only upon discovering that at long last the government would be reviewing the claims. These circumstances are not such as can breed confidence that respondent may be relied upon in the future to regulate its own advertising when the government may again not be looking over its shoulder, without the encouragement of an order. And we find without merit the contention that the circumstances of discontinuance in this case should be considered an affirmative defense to an otherwise plain violation of law.[4]

III. Order

The argument put forth most seriously by respondent concerns the scope of the order entered by the administrative law judge. Respondent objects to paragraph II of the order, which prohibits false performance claims, and to paragraph III, to the extent it requires maintenance of substantiating materials for performance claims. Respondent contends that the representation challenged in this case was not a performance claim at all, but only a uniqueness claim, and that the order should be no broader than paragraph I, which prohibits false uniqueness claims, while paragraph III should be modified to require maintenance of substantiation for uniqueness claims only.

We cannot agree that the false representations here in question dealt only with "uniqueness" and not "performance," nor do we believe that an order dealing only with uniqueness claims would be in the public interest or serve to prevent future occurrences of the sort involved here.

In claiming that only Fedders' air conditioners possessed RCP, respondent was clearly making a statement about the performance of its product, namely that this performance was unmatched. What rendered these false representations material in the eyes of consumers, and no doubt what led respondent to make them, was the message they conveyed about the relative performance of the product, and not merely the message of "uniqueness" in some disembodied sense.[5] An order addressed only to uniqueness claims and not to performance claims would be inadequate to insure that the same species of misrepresentation as has here occurred will not happen again.

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[4] It is also unclear, as the initial decision points out, to what extent respondent has actually managed to eliminate false claims of the sort challenged here from its advertising. (I.D. 34-35, [pp. 57-58 herein]) It appears that in Mar. 1974, an advertisement ran in *Newsweek* claiming "exclusivity" for a feature of respondent's "Climatrol" brand room air conditioner when in fact others of respondent's air conditioners possessed the same attribute. We do not think that this circumstance is essential to our finding that the abandonment defense must fail. It is, however, an additional ground for that conclusion, and suggests that even during the pendency of these proceedings, when respondent has had an unusual interest in avoiding repetition of false claims (to demonstrate the lack of necessity for an order) it has been unable to do so.

It remains then to consider the scope of the prohibition on false characterizations of performance. The administrative law judge and complaint counsel recommend a prohibition on misrepresentation of all performance characteristics. The performance characteristic in this case which was untruthfully and without reasonable basis represented to be unique involved air cooling capacity under conditions of extreme heat and humidity. In view of all the circumstances of this case, including the fact that only one performance characteristic was misrepresented, we believe that the order should be narrowed slightly to forbid only misrepresentations of performance characteristics of the general sort involved in the offending advertisements. An appropriate order is appended.

IN THE MATTER OF

MOTA-NU, INC., ET AL.

Docket C-2503. Order, Jan. 14, 1975

Denial of corporate respondent's petition to reopen proceedings.

Appearances

For the Commission: *Joseph Hickman.*

For the respondents: *James T. Blanton*, Fort Worth, Tex. and *Stein, Mitchell & Mezines*, Wash., D.C.

ORDER DENYING RESPONDENT'S PETITION TO REOPEN PROCEEDINGS

After having fully considered the Petition to Reopen Proceedings filed on behalf of respondent corporation MOTA-NU, Inc., and the

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[5] Consider an advertisement for air conditioners that represented them to be unique because of being painted with red, white, and green stripes. Certainly the consumer would be left thinking that the advertised air conditioner was "unique," but the Commission might be at pains to show that such a claim was material, nor can we imagine a sane advertiser spending money to make it. Uniqueness is obviously both an attribute in itself and one facet of broader categories of product characteristics, such as price, performance, and warranty terms.

Answer filed by the Bureau of Consumer Protection, the Commission has determined that respondent's Petition should be denied.

The Commission finds no changed conditions of fact or law which would justify reopening the order under Rule 3.72(b)(2). The Commission does not find that the change in corporate ownership of MOTA-NU, Inc. justifies reopening at this time. The Commission also finds that the ten individuals who purchased the corporation from its former owner, the individual respondent, knew of the existence of the agreement between the corporation and the Commission's staff before they purchased the corporation. Knowing of the existence of an agreement between the corporation and the Commission's staff, an agreement whose terms the staff of the Commission was precluded, by directive of the Commission, from divulging prior to official Commission action thereon, it was incumbent upon the purchasers to determine from the seller whether those terms might in any way affect their decision to purchase. If the seller failed to disclose the terms of the agreement to the purchasers, or misrepresented them, then that is clearly a matter to be resolved between purchasers and vendor, and does not justify modification of a consent order against the corporation.

Petitioner's other arguments do not demonstrate that the public interest would be served by reopening the order. Accordingly,

It is ordered, That respondent's petition be, and it hereby is, denied.

IN THE MATTER OF

MARTIN INDUSTRIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2624. Complaint, Jan. 16, 1975 - Decision, Jan. 16, 1975

Consent order requiring three Kansas City, Mo., affiliated sellers of a correspondence course in livestock buying, among other things to cease using deceptive sales tactics and from violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Keith Q. Hayes* and *Charles B. Wesonig.*

For the respondents: *James D. Veselich*, Kansas City, Mo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the implementing regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Martin Industries, Inc., Cattle Buyers, Inc., and Educational Finance Corp., corporations, and Daniel M. Martin, Jr., and George C. Kopp, III, individually and as officers of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and of the implementing regulations promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Martin Industries, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 2 E. Gregory Blvd., Kansas City, Mo.

Respondent Cattle Buyers, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri with its principal office and place of business located at 2 E. Gregory Blvd., Kansas City, Mo.

Respondent Educational Finance Corp. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri with its principal office and place of business located at 2 E. Gregory Blvd., Kansas City, Mo.

Respondents Daniel M. Martin, Jr., and George C. Kopp, III, are individuals and officers of each of the corporate respondents. Together, they formulate, direct, and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their addresses are the same as those of the corporate respondents.

Respondents cooperate and act together in carrying out respondents' business as hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the formulation, development, advertising, offering for sale, sale, and distribution of course(s) of vocational instruction purported to prepare graduates thereof for employment as livestock buyers.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their course(s) of vocational instruction in livestock buying to be advertised, sold, and financed to purchasers thereof located in the various States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said livestock buying course(s), in commerce, as "commerce" is defined in the Federal Trade Commission Act.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two and Three hereof are included by reference in Count I as if fully set out.

PAR. 4. In the course and conduct of their aforementioned business, respondents, for the purpose of obtaining leads to prospective purchasers and inducing the purchase of their course(s) of instruction, related products, and services by members of the public, have made, and are now making, numerous statements and representations in advertising appearing in various newspapers of general interstate circulation. Typical and illustrative of the foregoing, but not all inclusive thereof, are the following:

MEN WANTED
CATTLE
AND
LIVESTOCK
BUYERS

We want men in this area.
Train to buy cattle, sheep
and hogs.
We will train qualified men
with some livestock experience.
For local interview,
write today with your background.
Include your full
address and phone number.

CATTLE BUYERS, INC.
4420 Madison
Kansas City, Mo. 64111

* * * * * * *

THE LIVESTOCK INDUSTRY

NEEDS MEN

TRAINED AS
CATTLE
AND
LIVESTOCK
BUYERS* * *.

PAR. 5. By and through the use of the statements and representations as set forth in Paragraph Four and others similar thereto but not specifically set out herein, and through statements made orally and in writing by respondents, their employees, agents, and representatives, respondents have represented, and do now represent, directly or by implication, to the purchasing public that they offer employment to persons in the field of livestock buying.

PAR. 6. In truth and in fact, respondents do not offer employment to persons in the field of livestock buying, but are seeking prospective purchasers for their course(s) of instruction in livestock buying. Those persons, who respond to respondents' ads as set out in Paragraph Four above, are contacted for the purpose of enrolling them in respondents' course(s) of instruction in livestock buying.

Therefore, statements and representations as set forth in Paragraphs Four and Five hereof, were and are false, misleading, deceptive, and unfair.

PAR. 7. Respondents have offered, and now offer for sale, course(s) of instruction intended to prepare graduates thereof for employment in the livestock buying industry, without disclosing, in advertising or through their sales representatives:

1. That most persons enrolling in respondents' course(s) of livestock buying will not be employed in the livestock buying industry during or after completion of said course(s) of instruction because livestock buying cannot be learned from a correspondence course.
2. That there is little, if any, demand for those persons who graduate from respondents' course(s) of livestock buying instruction by any industry.
3. That respondents do not provide employment or offer assistance in obtaining employment in the field of livestock buying to those persons who graduate from respondents' course(s) of livestock buying.

Knowledge of such facts would indicate the possibility of securing future employment as a result of enrolling in respondents' course(s) of livestock buying. Thus, respondents have failed to disclose a material fact which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such course(s) of instruction.

Therefore, the aforesaid acts and practices were and are false, misleading, deceptive or unfair.

PAR. 8. (a) Respondents have been and are now using the aforesaid false, misleading, deceptive, or unfair acts and practices, which under all of the facts and circumstances, respondents should have known were false, misleading, deceptive, and unfair, to induce persons to pay or to contract to pay substantial sums of money for their course(s) of instruction which, in connection with said purchasers' future employment and careers, were, and are, virtually worthless. Respondents have received the said sums and have failed to offer refunds, or refund such sums, or rescind such contractual obligations of a substantial number of enrollees and participants in such course(s) who were unable to secure employment in the positions and fields for which they purportedly have been trained by respondents.

The use by respondents of the aforesaid acts and practices, their continued retention of said sums of money, and their continued failure to rescind such contractual obligations of their customers, as aforesaid, are unfair acts or practices.

(b) In the alternative, and separate to Paragraph Eight (a) herein, respondents, who are in substantial competition in commerce with corporations, firms, and individuals engaged in the sale of vocational courses of instruction, have been and are now using as aforesaid, false, misleading, deceptive, or unfair acts or practices to induce persons to pay substantial sums of money to purchase respondents' course(s) of instruction.

The effect of using the aforesaid acts and practices to secure substantial sums of money is, or may be, to hinder, lessen, restrain, or prevent competition between respondents and the aforementioned competitors.

Therefore, the said acts and practices constitute an unfair method of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 9. In the course and conduct of their business and at all times mentioned herein, respondents have been and are now in substantial competition in commerce with corporations, firms, and individuals engaged in the sale of courses of vocational instruction covering the same or similar subjects.

PAR. 10. The use by respondents of false, misleading, deceptive, and unfair statements, representations, acts, and practices, and their failure to disclose material facts, as aforesaid, has had and now has a capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and complete, and into the purchase of said respondents' course(s) in livestock buying, by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations of the Truth in Lending Act and the implementing regulations promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One, Two and Three hereof are incorporated by reference in COUNT II as if fully set forth verbatim.

PAR. 12. In the course and conduct of their business as aforesaid, respondents regularly extend, and for some time last past have regularly extended, consumer credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 13. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business and in connection with credit sales as "credit sale" is defined in Section 226.2(n) of Regulation Z, have caused and are now causing their customers to execute retail installment contracts, hereinafter referred to as the contract.

PAR. 14. By and through the use of the contract, respondents, in a number of instances, have failed to:

1. Disclose the term "Finance Charge" more conspicuously than other terminology as required by Section 226.6(a) of Regulation Z.
2. Use the term "Total of Payments" as required by Section 226.8(b)(3) of Regulation Z.
3. Use the term "Cash Price" as required by Section 226.8(c)(1) of Regulation Z.
4. Use the term "cash downpayment" as required by Section 226.8(c)(2) of Regulation Z.
5. Use the term "amount financed" as required by Section 226.8(c)(7) of Regulation Z.
6. Use the term "Deferred Payment Price" as required by Section 226.8(c)(8)(ii) of Regulation Z.

PAR. 15. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failure to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Martin Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2 E. Gregory Blvd., Kansas City, Mo.

Respondent Cattle Buyers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 2 E. Gregory Blvd., Kansas City, Mo.

Respondent Educational Finance Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 2 E. Gregory Blvd., Kansas City, Mo.

Respondent Daniel M. Martin, Jr. is an officer of said corporations and George C. Kopp, III, was an officer of said corporations until Sept. 1, 1974. Prior to Sept. 1, 1974, respondents formulated, directed and controlled the policies, acts and practices of said corporations. Subsequent to Sept. 1, 1974, respondent Daniel M. Martin, Jr., has formulated, directed and controlled the policies, acts and practices of said corporations. Respondents' principal office and place of business prior to Sept. 1, 1974, was 2 E. Gregory Blvd., Kansas City, Mo.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

COUNT I

It is ordered, That respondents Martin Industries, Inc., Cattle Buyers, Inc., and Educational Finance Corp., corporations, their successors and assigns, and their officers, and Daniel M. Martin, Jr., and George C. Kopp, III, individually and as officers of each of said corporations and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of courses of study, training, or instruction in the field of livestock buying or any other course of instruction, or product, or service, in any field in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Respresenting orally, in writing, or in any other manner, directly or by implication, that:

(a) Persons who enroll in any course(s) of instruction offered by respondents will be employed as buyers in the livestock industry or any other industry.

(b) Respondents offer employment in the livestock industry or any other industry.

(c) Respondents assist or are able to assist any person in securing employment as a buyer in the livestock industry or in any other position.

(d) There is a demand for persons completing the course offered by respondents in the area of cattle buying, selling, or trading.

2. Failing to disclose clearly and conspicuously, in all advertising and promotional material, that respondents are seeking prospective purchasers for their course(s) of instruction and do not offer employment or assistance in obtaining employment.

3. Failing to send by certified mail, return receipt requested, to each person who contracts for the sale of any course of instruction, a notice, in a form approved by the Commission, which shall disclose the following information and none other:

(a) The title "*IMPORTANT INFORMATION*" printed in bold face type across the top of the form.

(b) A paragraph reciting the following affirmative disclosures:

(1) A statement disclosing that most persons enrolling in respondents' course(s) of livestock buying will not be employed in the livestock buying industry during or after completion of said course(s) of instruction.

(2) A statement disclosing that respondents do not offer or assist their students in obtaining employment.

(3) A statement disclosing the total number of students who have enrolled in each course of instruction offered by respondents for each of the three (3) preceding calendar years.

(4) A statement disclosing the total number of students who have graduated from each course of instruction offered by respondents for each of the three (3) preceding calendar years.

(5) A statement disclosing the total number of students which respondents can affirmatively show have become employed as a result of completing any of respondents course(s) of instruction for each of the three (3) preceding calendar years.

(6) An explanation of the cancellation procedure provided in this order, namely, that any contract or other agreement may be cancelled within three (3) days after receipt by the customer, via the United States mails, of this notice.

(7) Said notice shall contain a detachable form which the person may use as a notice of cancellation, which indicates the proper address for accomplishing any such cancellation.

(8) The said notice shall be sent by respondents no sooner than the next day after the person shall have executed a contract for the sale of any course(s) of instruction.

4. Contracting for any sale of any course(s) of instruction in the form of a sales contract or other agreement which shall become binding prior to the end of the third business day after the day of receipt by the customer of the form of notice provided in Paragraph 3 of this order.

5. Failing to keep adequate records which may be inspected by the Commission staff members upon reasonable notice:

(a) Which disclose the facts upon which any placement statistics or claims or other representations of the type described in Paragraph 3(b)(3), (4) and (5) of this order are based, and

(b) From which the validity of any placement statistics described in Paragraph 3(b)(3), (4) and (5) of this order can be determined,

for so long as such statistics, claims, or other representations are disseminated, made, or authorized by respondents, or are required to be disclosed hereunder and for a period of three (3) years after respondents' termination of dissemination, use, authorization, or disclosure of such statistics, claims, or representations (whichever period is the longer).

It is further ordered, That respondents, in connection with the sale, or offering for sale of any course(s) of instruction or training:

A. Inform orally all prospective purchasers to whom solicitations are made, and provide, in writing, in all applications and contracts, in at least ten-point bold type, that the application or contract may be cancelled for any reason by notification to respondents, in writing, within three (3) days from the date of receipt of the form of notice provided in Paragraph 3 of this order.

B. Refund immediately all monies to all purchasers who have requested cancellation of the application or contract within three (3) days from the date of receipt of the form of notice provided in Paragraph 3 of this order.

COUNT II

It is further ordered, That respondents Martin Industries, Inc., Cattle Buyers, Inc., and Educational Finance Corp., corporations, their successors and assigns, and their officers, and Daniel M. Martin, Jr., and George C. Kopp, III, individually and as officers of each of said corporations and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any extension of consumer credit as "consumer credit" is defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to disclose the term "Finance Charge" more conspicuously than other terminology as required by Section 226.6(2) of Regulation Z.

2. Failing to use the term "Total of Payments" to describe the sum of the payments scheduled to repay the indebtedness as required by Section 226.8(b)(3) of Regulation Z.

3. Failing to use the term "Cash Price" to designate the cash price of the property or service which is the subject of the transaction as required by Section 226.8(c)(1) of Regulation Z.

4. Failing to use the term "Cash Downpayment" to designate any downpayment in money, as required by Section 226.8(c)(2) of Regulation Z.

5. Failing to use the term "amount financed" to designate the amount financed as required by Section 226.8(c)(7) of Regulation Z.

6. Failing to use the term "Deferred Payment Price" to describe the sum of the "cash price", all other charges which are included in the amount financed but which are not part of the finance charge, and the finance charge as required by Section 226.8(c)(8)(ii) of Regulation Z.

It is further ordered, That:

1. Respondents herein deliver a copy of the decision and order in this matter to each of their present and future employees, salesmen, agents, solicitors, independent contractors, or to any other person who promotes, offers for sale, sells, or distributes any course of instruction included in this order.

2. Respondents herein provide each person so described in Paragraph 1 above with a form, returnable to the respondents, clearly stating their intention to be bound by and to conform their business practices to the requirements of this order; retain said statement during the period said persons are so engaged; and make said statement available to the Commission's staff for inspection and copying purposes upon request.

3. Respondents herein inform each person so described in Paragraph 1 above that the respondents will not use or engage, or will terminate the use or employment of any such party, unless such party agrees to and does file notice with the respondents that he will be bound by provisions contained in this order.

4. If such party as described in Paragraph 1 above will not agree to so file the notice set forth in Paragraph 2 above with the respondents and be bound by the provisions of the order, the respondents will not use or employ or continue the use or employment of such party to promote, offer for sale, sell, or distribute any course of instruction included in this order.

5. Respondents herein inform the persons described in Paragraph 1 above that the respondents are obligated by this order to discontinue dealing with, or to terminate the use or employment of persons who continue on their own the deceptive acts or practices prohibited by this order.

6. Respondents herein institute a program of continuing surveillance adequate to reveal whether the business practices of each said person described in Paragraph 1 above conform to the requirements of this order.

7. Respondents herein discontinue dealing with or terminate the use or engagement of any person described in Paragraph 1 above, as revealed by the aforesaid program of surveillance, who continues on his own any act or practice prohibited by this order.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each corporation, and division of such corporation, through which they transact business in conjunction with the promotion, advertisement, solicitation, and/or sale of any course(s) of instruction.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

HATTIE CARNEGIE JEWELRY ENTERPRISES, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND HOBBY PROTECTION ACTS

Docket C-2625, Complaint, Jan. 20, 1975 - Decision, Jan. 20, 1975

Consent order requiring two New York City manufacturers and distributors of numismatic items, among other things to cease failing to make the word "copy" plainly and permanently on all imitation numismatic items manufactured by respondents.

Appearances

For the Commission: *Justin Dingfelder.*

For the respondents: *Arnold S. Jacobs, Shea, Gould, Climenko & Kramer*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Hobby Protection Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hattie Carnegie Jewelry Enterprises, Ltd., a corporation, and Gibraltar Mint, Inc., a corporation, and Lawrence Joseph and Howard N. Levine, individually and as officers of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Hattie Carnegie Jewelry Enterprises, Ltd., and Gibraltar Mint, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their principal offices and places of business both located at 10 E. 38th St., New York, N.Y.

Respondents Lawrence Joseph and Howard N. Levine are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for some time in the past have been, engaged in the manufacture, and in the sale and distribution of various items of merchandise, including imitation numismatic items, to dealers and others for resale to the public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause and for some time in the past have caused imitation numismatic items to be shipped from their place of business in the State of New York to retailers and others located in various other States in the United States, and respondents maintain, and at all times mentioned herein have maintained a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents have since Nov. 29, 1973, manufactured in the United States for distribution in commerce, and have distributed and sold in commerce copies of privately minted 1854 Liberty Head Twenty Dollar Gold Pieces and privately minted 1855 Liberty Head Fifty Dollar Gold Pieces. The aforesaid coins are imitation numismatic items, as defined in Section 7 of the Hobby Protection Act, and were not plainly and permanently marked "copy" as required by Section 2(b) of said Act.

PAR, 5. Respondents' aforesaid acts and practices as alleged in Paragraph Four hereof were and are a violation of Section 2(b) of the Hobby Protection Act, and such violation is an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act. Pursuant to Section 4(b) of the Hobby Protection Act, the aforesaid acts and practices of respondents constituted and now constitute a violation of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Hobby Protection and Federal Trade Commission Acts; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondents Hattie Carnegie Jewelry Enterprises, Ltd., and Gibraltar Mint, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their offices and principal places of business both located at 10 E. 38th St., N.Y., N.Y.

Respondents Lawrence Joseph and Howard N. Levine are officers of said corporations. They formulate, direct and control the policies, acts and practices of said corporations and their address is the same as that of said corporate respondents.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Hattie Carnegie Jewelry Enterprises, Ltd., and Gibraltar Mint, Inc., corporations, their successors and assigns, and their officers, and Lawrence Joseph and Howard N. Levine, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacture and distribution of any imitation numismatic item, as "imitation numismatic item" is defined in the Hobby Protection Act (Pub.L. 93-167, 15 U.S.C. § 2101, *et seq,*) do forthwith cease and desist from:

Failing to mark "COPY" plainly and permanently on all imitation numismatic items manufactured by respondents, as required by Section 2(b) of said Act. The word "COPY" shall appear in capital letters, in the English language, incused in sans-serif letters having a vertical dimension of not less than two millimeters (2.0 mm) and a minimum depth of three-tenths of one millimeter (0.3 mm) or to one-half (1/2) the thickness of the reproduction, whichever is the lesser. The minimum total horizontal dimension of the word "COPY" shall be six millimeters (6.0 mm).

It is further ordered, That corporate respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

HOLIDAY MAGIC, INC., ET AL.

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2, OF THE CLAYTON ACT

Docket 8834. Decision, Oct. 15, 1974 Order, Jan 21, 1975*

Order modifying Final Order issued against respondents on Oct. 15, 1974, 40 F.R. 10665, 84 F.T.C. 748, by deleting Paragraph V of the order which required corporate respondent and respondent Olivo to make restitution as provided therein.

Appearances

For the Commission: *Joseph S. Brownman* and *D. Stuart Cameron.*

For the respondents: *Alvin H. Goldstein, Jr., Tuckman, Goldstein & Philips,* San Francisco, Calif.

ORDER REOPENING PROCEEDING AND MODIFYING FINAL ORDER

The Commission's final order in this matter, dated Oct. 15, 1974, provided, in Paragraph V, that respondent Olivo should make restitution as provided therein, and that corporate respondent, Holiday Magic, should also make restitution. The requirement as to Holiday Magic, however, was to be effective only in the event that the company should cease to be in compliance with a district court order also requiring that it make restitution. By order dated Jan. 8, 1975, the Commission denied a motion of respondent Olivo to reconsider its order as to him.

In its opinion, the Commission recognized that its action in ordering restitution, in particular its assertion that it possessed the authority to do so, was contrary to the holding of the Ninth Circuit Court of Appeals in the case of *Heater* v. *Federal Trade Commission,* No. 73-1750, Sept. 11, 1974 [503 F.2d 321 (1974)]. In footnote 11, page 23 [84 F.T.C. 1045] of its final decision, the Commission noted its disagreement with the holding in *Heater* and stated that it would seek to obtain review of the decision by the Supreme Court.

Subsequent to rendition of the Commission's final order in this matter, and rendition of its order denying the motion to reconsider, the Commission has determined that it will not seek review of the *Heater* decision by the Supreme Court. While this determination should not be construed to signify a change in the view of the Commission regarding the correctness of the *Heater* decision, it does eliminate any possibility that *Heater* will not continue to be governing law in the Ninth Circuit. Corporate respondent's principal place of business is in the Ninth Circuit; individual respondent and the estate of the deceased respondent are situated in the Ninth Circuit, and respondents have appealed this matter in that circuit. Under these circumstances the Commission does not feel that it is privileged to disregard judicial precedent of such recent and clearly dispositive vintage. Under the holding in *Heater*, at the time the Commission issued its final order in this matter it was not empowered by the F.T.C. Act to require respondent to make restitution for prior fraudulent activities. That holding not having been overruled, it would now be improper for the Commission, only a short time thereafter, to put respondent to the expense of relitigating the same issue in the same forum. This is particularly so inasmuch as the assets of the wrongdoer's estate with which the cost of such litigation would be financed are limited, and may be subject to other claims, including claims of private plaintiffs seeking repayment for the same wrongs which led the Commission to issue the original order of restitution in this case.

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* Reported in 84 F.T.C. 748. Petitions for review of the Oct. 15, 1974 order to cease and desist were filed in the Court of Appeals for the Ninth Circuit. Subsequently, the appeals were dismissed pursuant to petitioners' motion.

Pursuant to Section 3.72(a) of its rules of practice, the Commission may, "prior to the filing of the transcript of the record of a proceeding in a United States court of appeals pursuant to a petition for review" reopen the proceeding on its own motion and modify its order in said proceeding. Therefore,

It is ordered, That this matter be reopened and that the final order be modified by striking Paragraph V in its entirety, and renumbering all subsequent paragraphs.

Commissioner Nye not participating.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Order, Jan. 21, 1975

Denial of application by all respondents except Texaco for review of administrative law judge's ruling denying motions to exclude issues beyond the scope of the complaint.

Appearances

For the Commission: *Peter A. White, James H. Thessin, James C. Egan, Jr.* and *Ira S. Nordlicht.*

For the respondents: *William Simon, J. Wallace Adair, McKean,* *Whitehead & Wilson, Donovan, Leisure, Newton & Irvine,* and *Steptoe & Johnson,* all of Wash., D.C. *William Weitzel, Wickes, Riddell, Bloomer, Jaboci & McGuire, Vincent A. Moccio, Charles F. Rice, Benjamin T. Richards* and *Kaye, Scholer, Fierman, Hays & Handler,* all of New York City. *W. Bernard Fudge, Jesse P. Luton, John H. Chiles* and *George S. Wolbert, Jr.,* all of Houston, Tex. *M. J. Keating* and *Kirkland & Ellis,* Chicago, Ill. *Pillsbury, Madison & Sutro,* San Francisco, Calif. and *Donald A. Bright,* Los Angeles, Calif.

ORDER DENYING APPLICATION FOR REVIEW

By leave of the administrative law judge under Section 3.23(b) of our rules of practice, all respondents except Texaco have filed an Application for Review of Ruling (of the administrative law judge) Denying Motions of Respondents to Exclude Issues Beyond the Scope of the complaint. Specifically, respondents argue that certain allegations concerning their foreign operations and their relationships with financial institutions, which complaint counsel have stated their intention to prove, are not related to any of the charges contained in the complaint in this matter. By order of Oct. 29, 1974, the law judge denied their motions to exclude such issues for the purposes of discovery and presentation of evidence. Complaint counsel do not oppose review of this order.

The law judge's order is not appropriate for interlocutory review. The question of whether evidence on particular factual propositions is relevant to one or more allegations in a complaint is well within the area of trial management and, in the absence of a clear abuse thereof, is committed to the sound discretion of the law judge. Accordingly,

It is ordered, That the aforesaid application for review be, and it hereby is, denied.

IN THE MATTER OF

AMERICAN CYANAMID COMPANY

MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket C-2381. Decision, Apr. 16, 1973 - Order, Jan. 21, 1975

Order modifying divestiture order issued against respondent Apr. 16, 1973, 82 F.T.C. 1220, 38 F.R. 12331, by striking from Part I, the requirement that respondent divest itself of the plant located in Moosic, Pa.

Appearances

For the Commission: *James T. Halverson.*

For the respondent: *J. Wallace Adair, Howrey, Simon, Baker & Murchison,* Wash., D.C.

ORDER REOPENING PROCEEDING AND MODIFYING DIVESTITURE ORDER

This matter is before the Commission on a petition filed by respondent American Cyanamid Company on Dec. 20, 1974, requesting that the proceeding in the above-captioned matter be reopened for the purpose of modifying the order of divestiture issued therein on Apr. 16, 1973, so as to relieve respondent of any further obligation to divest its plant located in Moosic, Pa.

In support of this request respondent alleges that the principal purpose of the divestiture provisions of the aforesaid Commission order has already been accomplished by respondent's sale of two lines of men's toiletries on Apr. 1, 1974; that the plant in question was never used to produce these two product lines; and that the plant is presently an unoccupied, nonproductive facility. The director of the Bureau of Competition has filed an answer to the petition advising that he does not oppose the granting of the relief requested.

Having considered the petition and the answer thereto, the Commission is of the opinion that in the circumstances shown to exist the public interest will be served by reopening this proceeding for the purpose of modifying the order to the limited extent requested. Accordingly,

It is ordered, That this proceeding be, and it hereby is, reopened, and that the Commission's order of Apr. 16, 1973, be, and it hereby is, modified by striking from Part I thereof the requirement that respondent divest itself of the plant located in Moosic, Pa.

IN THE MATTER OF

FUQUA INDUSTRIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2626. Complaint, Jan. 21, 1975 - Decision, Jan, 21, 1975

Consent order requiring an Atlanta, Ga., vocational school operator and franchisor, among other things to refund up to $1.25 million to eligible former students; and requiring a St. Petersburg, Fla., vocational school operator and franchisor,

among other things to disclose designated information such as drop-out rates and positions and salaries received by graduates; to allow enrollees a 10-day period in which to affirm their enrollment contracts, with cancellation of contract; and to provide prospective franchisees with full particulars on the franchise operation in writing.

Appearances

For the Commission: *Charles L. Hall, Morgan D. Hodgson* and *Donald Williams.*

For the respondents: *Kirkland, Ellis & Rowe,* and *Arent, Fox, Kintner, Plotkin & Kahn,* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Fuqua Industries, Inc., a corporation, Space/Time, Inc., a corporation, Nationwide Acceptance Corporation, a corporation, Fortune Enterprises, Inc., a corporation, and William L. Phillips, individually and as an officer and director of Fortune Enterprises, Inc,, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Fuqua Industries, Inc. (hereinafter sometimes referred to as F/I) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3800 First National Bank Tower, in the city of Atlanta, State of Georgia.

Respondent Space/Time, Inc., (hereinafter sometimes referred to as S/T) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3800 First National Bank Tower, in the city of Atlanta, State of Georgia. All the stock of Space/Time, Inc. is owned by Fuqua Industries, Inc. Respondent S/T is now and for sometime last past has been, an advertising agency for wholly-owned subsidiaries of respondent F/I, and for sometime last past, has caused publication and dissemination of advertising material, including, but not limited to, the advertising referred to herein, to promote the sale of vocational courses of instruction.

Respondent Nationwide Acceptance Corporation (hereinafter sometimes referred to as NAC) is a corporation organized, existing and doing business under and by virtue of the laws of the State of

Delaware, with its principal office and place of business located at 3800 First National Bank Tower, in the city of Atlanta, State of Georgia. All the stock of Nationwide Acceptance Corporation is owned by Fuqua Industries, Inc. Respondent NAC is now and for sometime last past has been, a holder of commercial paper and a collection agency for respondent F/I.

Respondent F/I formulates, directs and controls the acts and practices of its said wholly-owned subsidiaries, including the acts and practices hereinafter set forth, and performed in same manner with respect to Career Enterprises, Inc. (hereinafter sometimes referred to as CE) a corporation respondent wholly-owned from June 1969 to December 1971. With respect to the acts and practices of Career Enterprises, Inc. hereinafter set forth, respondent F/I knew or should have known of the said acts and practices and failed to exercise its control to curb the said acts and practices. Alternatively, with respect to the acts and practices of Career Enterprises, Inc. hereinafter set forth, respondent F/I upon acquisition and thereafter failed to investigate the said acts and practices and, thus, failed to exercise its control to curb the said acts and practices. In Dec. 1971 CE was sold by respondent F/I to Fortune Enterprises, Inc.

Respondent Fortune Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its principal office and place of business located at 2951 34th Street South, in the city of St. Petersburg, State of Florida.

Respondent William L. Phillips is founder, president and sole stockholder of Fortune Enterprises, Inc., and was founder, director and chief executive officer of CE. Phillips formulates, directs and controls the acts and practices of Fortune Enterprises Inc., including the acts and practices hereinafter set forth, and performed in the same manner with respect to CE. Phillips and Fortune Enterprises, Inc. have the same business address.

PAR. 2. Through CE, respondents have for some time last past engaged in the formulation, development, offering for sale, sale and distribution of courses of instruction intended to prepare graduates thereof for entry-level employment in the following positions: computer programmers, keypunch operators, cashier-checkers, PBX receptionists, secretaries, medical and paramedical personnel, nurses' aides and laboratory technicians. Respondents' volume of business in said courses of instruction was substantial.

Such business was conducted by respondents by establishing company owned branch facilities which offered resident instruction in the aforesaid courses and by selling franchises to other individuals, corporations or partnerships to operate facilities offering resident instruction in the aforesaid courses.

Respondents' branch facilities and franchised facilities offered said courses to the general public under various trade names owned and authorized for use by respondents as follows: Career Training Institute (CTI); Career Training Center (CTC); Cashier Training Institute (CTI); Keypunch Academy (KPA); and (name of city) Business Institute. Additionally, respondents entered into a management-sales contract whereby training facilities were established by respondents to offer courses in medical, paramedical, nurses' aide and laboratory technician training, and designated Medical Training Centers (MTC), and thereafter sold to a third party, reserving management rights and fees to respondents for the continued operation of such facilities.

Respondents furnished the means and instrumentalities for, and placed into operation and implemented themselves, a sales program whereby members of the general public, by means of advertisements placed in broadcast and printed media of general circulation, by promotional brochures, and by means of training and supplying personnel in the operation and management of said training facilities, and by means of statements, representations, acts and practices as hereinafter set forth, were induced to sign contracts of enrollment agreements for a course of instruction of a stated length of time and for a stated tuition cost, or induced to sign contracts to purchase franchises from CE.

Respondents arranged or assisted in the arrangement of credit and deferred payment terms for the financing of said executed contracts and accepted the proceeds and revenues following therefrom or derived substantial income therefrom in the form of royalty payments from said enrollment contracts, franchise contracts and management-sales contracts.

In the manner aforesaid, respondents dominated, controlled, furnished the means, instrumentalities, services and facilities for, and condoned, approved, and accepted the pecuniary and other benefits following from the acts and practices hereinafter set forth of respondents' company branch facilities and franchisees.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents for some time last past caused said aforementioned courses of instruction to be distributed from CE's place of business to said aforementioned branch facilities and franchisees located in various States of the United States other than the state of organization of said courses. Respondents transmitted and received and caused to be transmitted and received, in the course of the sale of, distribution of and financing of their courses of instruction by said company facilities and franchisees among and between the several States of the United States, retail installment contracts, credit applications, checks, royalty reports, monies or other commercial paper. Respondents maintained at all times mentioned herein a substantial course of trade in said courses of instruction and said franchises in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and to induce the purchase of their courses of instruction by members of the general public, respondents and their company branch facilities and franchisees and the salespersons at the branch facilities and franchisees have disseminated or caused the dissemination of, via the United States' mails or other means, radio, television, newspaper, print media, or other forms of advertising, or other means and instrumentalities which are furnished, approved or condoned by respondents. In the further course and conduct of their business, as aforesaid, respondents have caused advertisements to be published in the "Help Wanted" columns of daily newspapers' classified advertising sections. In conjunction therewith, respondents and their company facilities and franchisees have made certain statements and representations respecting the existence of specific jobs in which graduates of respondents' training facilities will be placed upon completion of training, the offering of immediate or eventual employment of qualified applicants, the existence of a substantial demand for persons possessing the skills which are taught at respondents' training facilities, the time required to successfully complete respondents' courses, the nature of placement services offered, the offering of a vocational training program specially designed for known employment requirements and the offering of a financial plan of deferred tuition payments until after completion of training.

In further course and conduct of their business, respondents operated a sales plan to market their courses of instruction by enfranchising persons to sell such courses under an "Agreement and Franchise" purporting to assign a particular location in which the franchisee could sell one or more of the aforesaid courses of instruction to members of the public.

For the purpose of inducing the purchase of CE franchises, respondents have made statements and representations in oral sales presentations to prospective purchasers and in newspaper advertisements and promotional literature respecting the aforesaid courses of instruction, the earnings and profits to be realized by selling such courses, the training or business opportunity for absentee-management arrangements, and the demand for skills taught by respondents branch facilities and franchisees.

Typical of the statements and representations in said advertisements, but not all inclusive thereof, are the following:

A. Radio and Television

Hey, men and women of BLANK and surrounding area, are you untrained or unemployed? Medical Training Centers are now selecting many, many nurses aid trainees. * * * The first 23 people who qualify will start immediately. That's right - I said immediately.

* * * * * * *

* * * You need no high school diploma or experience, and there's no age limit. Don't wait. Start getting the big money and the fringe benefits and job security that only an IBM career brings.

* * * * * * *

Attention men and women of Grand Rapids and surrounding areas - there is now a shortage of trained personnel in the IBM field. Keypunch Academy is now accepting applications for a special training program designed especially to fill these positions.* * * contact us immediately * * * call now and be job ready after a short training period.

* * * * * * *

Because of the tremendous need for trained IBM keypunch operators in the computer industry, (name of school) is now offering women and men in (city) and surrounding areas an opportunity to be trained* * *.

* * * * * * *

* * *CTI is now interviewing people to be IBM keypunch trainees. The people selected will be trained on the latest equipment and methods available * * *.

* * * * * * *

Need a job fast? People in (city) and surrounding areas, CTI now needs men and women to be IBM keypunch trainees.

* * * * * * *

Attention men and women of Grand Rapids and surrounding areas - there is now a shortage of trained personnel in the IBM field. Keypunch Academy is now accepting applications for a special training program designed especially to fill these positions.

B. Newspaper

NEEDED NOW! Wanted Immediately - Keypunch trainees. No experience necessary, no age limit. We will train sharp individuals.

* * * * * * *

MALE ORDERLY Trainees needed for Nashville area. Training to start immediately * * *.

CALL

254-7514

Medical Training Center.

* * * * * * *

NURSES ASSISTANT

MALE ORDERLY

After a short training period a future prestige job awaits you in the medical field.

* * * * * * *

NEEDED NOW

Trainees needed in Hospitals, Clinics, Nursing Homes and in Doctor's offices in the Nashville area * * * Free job placement service assistance. Student loans available.

* * * * * * *

JOB OPPORTUNITIES

UNLIMITED

* * * * * * *

$ HELP $

We need ladies immediately to be trained on our latest equipment and methods as keypunch trainees.

* * * * * * *

* * *CTI offers intensive *individualized* instruction especially designed for you.

* * * * * * *

START A NEW CAREER NOW

BE JOB READY IN 8-10 WKS

* * *must be willing to start work immediately.

* * * * * * *

* * *FREE placement service . . .TRAIN NOW - PAY LATER * * *

* * * * * * *

IBM KEYPUNCH TRAINEES

Immediate openings, no age or educational requirements, we will train. Call 436-9225 NOW.

* * * * * * *

NURSES AIDES

CTI is now selecting 30 nurses aid trainees for the Akron area. WE TRAIN YOU* * *

* * * * * * *

KEYPUNCH ACADEMY

ATTENTION! ATTENTION!

Men and Women in the Topeka and surrounding areas, KPA now needs thirty (30) people to train to be Keypunch Operators. . . If you don't have a job or you are tired of your present job, call 233-6494 to see if you qualify for one of these training positions* * *

* * * * * * *

KEYPUNCH OPERATOR

High School not required. No age limit. 542-7494

* * * * * * *

TRAIN NOW FOR GOOD

PAYING JOB OPPORTUNITIES

IN IBM KEYPUNCH . COMPUTER

PROGRAMMING.

Classes are limited. Individual Instruction.

* * * * * * *

HIGH SCHOOL SENIORS

OVER 260 IMMED. OPENINGS.

High school grads willing to train in a computer career. Salaries to $145 per wk. Call Mr. Storke 654-8866, 305 W. 12 St.

* * * * * * *

LIFETIME OPPORTUNITY

Own your own franchise in the

world's fastest growing business.

* Depression Proof

* Turn Key Operation

* Ideal for Husband? Wife Team

* Absentee Management Available

* Protected Franchise Area

* Minimum Cash Needed $10,000

* Net $10,000 to $40,000 Per Year

Write or Call

B.A. HUTTER, V-P

CAREER

ENTERPRISES, INC.

C. Promotional Brochure

Here let us take a moment to comment upon the aspects of our advertisement which prompted your welcome query. We indicated that your first year of operation with us could produce a significant income ranging from $15,000 to $50,000. We mean just that, and these are net profit figures. The secret to our success is "low overhead, coupled with volume activity." This is not merely an idle claim. We have available for your inspection, certified figures on our own as well as our franchised schools. These figures reflect annual gross sales, operating costs, and net profit. Enclosed as part of this informational packet you will find information and recent figures applicable to representative schools within our system. A review of this information will readily reveal how your initial investment can be returned to you in just a few short months. This can not be said of any other business known to us.

First let us say that our offering is exactly as presented. The advertisement which prompted your query contains only true and correct details. Imagine if you will hundreds of training facilities located throughout the country, half of which are owned and operated by us, the other half operated under our franchise.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents and their company facilities and franchisees and the salespersons of the company facilities and franchisees have represented directly or by implication, that:

1. Inquiries are being solicited for the purpose of offering immediate training to qualified applicants who will be employed after the completion of said training.

2. Inquiries are being solicited for the purpose of offering

immediate employment to qualified applicants, who will be provided with on-the-job training.

3. Respondents have knowledge of specific jobs in which their graduates will be placed upon completion of training.

4. Respondents had a reasonable basis from which to conclude that:

(a) there was at the time such representations were made, or

(b) would be at the time that persons then enrolling graduated from respondents' courses

an urgent need or demand for all or most of respondents' graduates in positions for which respondents trained such persons.

5. A purchaser will complete respondents' courses within the specified course duration advertised for said courses.

6. The placement assistance furnished by respondents is free.

7. Placement assistance is furnished to all graduates of respondents' courses who seek placement;

8. Respondents furnish individualized training or instruction.

9. Respondents offer a vocational training program which is specially designed to qualify graduates for the employment requirements known to be existing in the local community.

10. Respondents make available to purchasers of their courses of instruction a finance plan whereby all tuition payments may be deferred until after completion of training,

11. Respondents' graduates who seek employment in the positions for which respondents have trained them do not find it necessary, in many instances, to seek said employment through sources other than respondents' placement office.

12. Graduates of respondents' courses are presently being hired by certain local business entities.

13. Graduates of respondents' courses are guaranteed a job through respondents' placement office.

14. A purchaser of respondents' courses will receive a full refund of his "reservation fee" if he decides to cancel before beginning classes.

15. Certain of respondents' training facilities have standing contractual agreements with local business entities whereby said entities agree to employ the graduates of said facilities.

16. Respondents will place students in part-time employment positions during the time that such students are enrolled in respondents' courses of instruction.

17. Respondents' courses are approved by the appropriate government agency for veterans' educational assistance benefits from the United States Government.

PAR. 6. In truth and in fact:

1. Inquiries are not solicited for the purpose of offering immediate

training to qualified applicants who will be employed after the completion of said training, but are solicited for the sole purpose of obtaining leads to prospective purchasers of respondents' courses of instruction.

2. Inquiries are not solicited for the purpose of offering immediate employment to qualified applicants, who will be provided with on-the-job training, but are solicited for the sole purpose of obtaining leads to prospective purchasers of respondents' courses of instruction.

3. Respondents do not have knowledge of specific jobs in which their graduates will be placed upon completion of training.

4. Respondents had no reasonable basis from which to conclude that:

(a) there was at the time such representations were made, or

(b) would be at the time that persons then enrolling graduated from respondents' courses,

an urgent need or demand for all or most of respondents' graduates in positions for which respondents trained such persons;

5. In a substantial number of instances purchasers of respondents' courses do not complete said courses within the specified course duration advertised for said courses.

6. The placement assistance furnished by respondents is not free, but rather included in the tuition cost of respondents courses.

7. Placement assistance is not furnished to all of respondents' graduates who seek placement.

8. Respondents do not furnish individualized training or instruction, but rather furnish group classroom instruction.

9. Respondents do not offer a vocational training program which is specially designed to qualify graduates for the employment requirements known to be existing in the local community, but rather offer a standardized curriculum.

10. Respondents do not make available to purchasers of their courses of instruction a finance plan whereby all tuition payments may be deferred until after completion of training. The terms of respondents' finance plan require that tuition be paid in installments during the scheduled duration of the course, with the last installment due before the scheduled completion of the course.

11. Respondents' graduates who seek employment in the positions for which respondents have trained them do find it necessary, in many instances, to seek said employment through sources other than respondents' placement office.

12. In a substantial number of instances, the aforementioned certain local business entities were not hiring respondents' graduates

at the time that the representation was made that graduates were being hired.

13. Graduates of respondents' courses are not guaranteed a job through respondents' placement office.

14. In many instances a purchaser of respondents' courses does not receive a full refund of his "reservation fee" if he decides to cancel before beginning classes.

15. Respondents' training facilities do not have standing contractual agreements with local business entities whereby said entities agree to employ the graduates of said facilities.

16. In a substantial number of instances, respondents do not place students in part-time employment positions during the time that such students are enrolled in respondents' courses of instruction.

17. In a substantial number of instances, respondents' courses were not approved by the appropriate government agency for veterans' educational assistance benefits from the United States Government at the time that such approval was represented.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof were, and are false, misleading or deceptive acts or practices.

PAR. 7. In the further course and conduct of their business, as aforesaid, respondents have placed or caused to be placed advertisements seeking purchasers for their courses of instruction in the "Help Wanted" or "Employment" columns of daily newspapers' classified advertising sections, thereby inducing members of the general public to believe that respondents are offering paid employment and not merely training for which the purchaser must pay. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 8. In the further course and conduct of their business, and in furtherance of their purpose of inducing the purchase of their courses by the general public, respondents acting directly through their company owned training facilities and furnishing the means and instrumentalities to their franchisees, directly or indirectly have engaged in the following additional acts or practices:

(a) Respondents have induced members of the general public to sign certain contracts entitled "Application." Respondents thereby have deceptively and misleadingly created the impression that said documents are not legally binding contractual agreements, when in fact said documents are legally binding contractual agreements.

Therefore, respondents' statements, representations, acts or practices as set forth herein were, and are, false, misleading, unfair or deceptive acts or practices.

PAR. 9. Through the use of the aforesaid advertisements and otherwise, respondents have represented, directly or by implication, that there was at the time of the representation, or would be at the time of graduation from respondents' courses, an urgent need or demand for respondents' graduates in positions for which respondents train such persons. At the time of the said representations respondents had no reasonable basis adequate to support such representation. Therefore, the aforesaid acts and practices were, and are, unfair acts or practices.

PAR. 10. Respondents have created an organization named National Career Educational Accrediting Association of Washington, D.C. (NCEAA) and have held out and represented that their company training facilities and franchisees are accredited by said organization, when in fact said organization has no standing as an independent, nationally recognized accrediting association. Respondents have thereby deceived and misled and furnished the means and instrumentalities to others to deceive and mislead the general public into believing that respondents' said company training facilities and franchisees are accredited institutions, and have induced enrollments in said company facilities and franchisees by reliance thereon. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 11. Respondents offered for sale courses of instruction in computer programming which required that students enrolled therein complete a certain amount of operating time on computer equipment without disclosing in advertising or through their sales representatives that respondents' training facilities did not contain all of the equipment necessary to instruct said students, and that said students must pay for the cost of transportation themselves between respondents' facilities and the location of the necessary equipment. Knowledge of such facts would indicate the full cost and time requirements of enrolling in said courses. Thus, respondents have failed to disclose a material fact, which if known to certain consumers would be likely to affect their consideration of whether or not to purchase said courses of instruction. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 12. Respondents offered for sale courses of instruction intended to prepare graduates thereof for entry level employment as computer programmers, keypunch operators, cashier-checkers, PBX receptionists, secretaries, medical and paramedical personnel, nurses' aides and laboratory technicians without disclosing in advertising or through their sales representatives: (1) the percentage of recent graduates of each school for each course offered that were able to obtain employment in the positions for which they were trained; (2) the employers that hired any such recent graduates for each course offered; (3) the initial salary any such recent graduate received for each course offered; and (4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction. Knowledge of such facts would be an indication of the probability of graduating from respondents' courses and would indicate the possibility of securing future employment upon graduating and the nature of such employment. Thus, respondents have failed to disclose material facts, which if known to a consumer would be likely to affect his or her consideration of whether or not to purchase such courses of instruction. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 13. Respondents have entered into contracts with purchasers of their courses of instruction which contained provisions for the cancellation of said contracts and the refund of tuition monies paid by said purchasers. In many instances, respondents have failed to offer to refund and refused to refund to purchasers who have cancelled their contracts such monies as may be due and owing according to the terms of said contracts.

The use by respondents of the aforesaid practice and their continued retention of said sums, as aforesaid, is an unfair act or practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 14. Respondents in many instances have terminated or caused to be terminated company branch facilities and franchise facilities without allowing students enrolled in said facilities at the time of termination to complete their course of training at no additional cost or change in terms, and have failed to offer to refund and refused to refund the tuition monies paid by said students to respondents.

The use by respondents of the aforesaid practice and their continued retention of said sums, as aforesaid, is an unfair act or practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 15. By and through the use of statements set forth in Paragraph Four hereof, and others, including oral statements, similar thereto but not specifically set out herein, respondents have represented, directly or by implication, that purchasers of said franchises would receive:

(a) advice and assistance from respondent for successfully maintaining and operating their businesses.

(b) a substantial income from the operation of profitable businesses, such as $10,000 to $40,000 per year.

PAR. 16. In truth and in fact, in a substantial number of instances, purchasers of said franchises did not receive:

(a) advice or assistance from respondents for successfully maintaining and operating their businesses.

(b) a substantial income from the operation of profitable businesses, nor incomes between $10,000 and $40,000 per year.

PAR. 17. Respondents offered for sale said franchises without disclosing in advertising or through their sales representatives: (1) The business experience and background of the franchisor and various key personnel; (2) the recent profit and loss statements of representative franchises; (3) the number of franchises which operated at a loss during the previous year; (4) the percentage of recent graduates of representative franchises that were able to obtain employment in the positions for which they were trained; (5) the employers that hired any such recent graduates; (6) the initial salary any such recent graduates received; and (7) the percentage of recent enrollees at representative franchises that have failed to complete their courses of instruction. Knowledge of such facts would be an indication of the probability of successfully operating one of said franchises. Thus, respondents have failed to disclose material facts which, if known to a consumer, would be likely to affect his or her consideration of whether to purchase such franchise. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 18.

(a) Respondents as aforesaid, failed to disclose material facts while using other false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money to purchase courses of instruction whose value to the said persons for future employment in the jobs for which training was offered was virtually worthless, and to pay over to respondents substantial sums of money to purchase said franchises whose value to said persons as an investment was virtually worthless. Respondents have received the said sums and have failed to offer to refund and refuse to refund such money to such purchasers of their courses and franchises.

The use by respondents of the aforesaid practices and their continued retention of the said sums, as aforesaid, is an unfair act or practice.

(b) In the alternative and separate from subparagraph (a) above, respondents, who were in substantial competition in commerce, with corporations, firms and individuals engaged in the sale of courses of vocational instruction, and the enfranchising of vocational instruction, did, as aforesaid, fail to disclose material facts while using false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money to purchase courses of instruction and franchises.

The effect of using the aforesaid acts and practices to secure substantial sums of money is or may be to substantially hinder, lessen, restrain, or prevent competition between the respondents and the aforesaid competitors.

PAR. 19. By and through the use of the aforesaid acts, practices, statements and representations, respondents placed in the hands of others the means and instrumentalities by and through which they misled and deceived the public in the manner and as to the things hereinabove alleged.

PAR. 20. In the course and conduct of their business, and at all times mentioned herein, respondents were in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of courses of instruction covering the same or similar subjects.

PAR. 21. The use by respondents of the aforesaid false, misleading, unfair or deceptive statements, representations, acts or practices, has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and to induce a substantial number thereof to purchase respondents' courses and franchises by reason of said erroneous and mistaken belief.

PAR. 22. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having received notice of said determination and having reviewed a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Fuqua Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3800 First National Bank Tower, in the city of Atlanta, State of Georgia.

Respondent Nationwide Acceptance Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3800 First National Bank Tower, in the city of Atlanta, State of Georgia.

Respondent Space/Time, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3800 First National Bank Tower, in the city of Atlanta, State of Georgia.

2. Respondent Fortune Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located 2951 34th Street South, in the city of St. Petersburg, State of Florida.

Respondent William L. Phillips is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his address is the same as that of said corporation.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Fortune Enterprises, Inc., a corporation, and its officers, and William L. Phillips, individually and as an officer or director of Fortune Enterprises, Inc., and those respondents' agents, representatives, employees, successors and assigns, directly or through any corporation, subsidiary, division, franchisee or other device, in connection with the creating, advertising, promoting, offering for sale or distribution of courses of study, training or instruction or of any franchise for any product or service in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing orally, visually, or in writing, directly or by implication, that:

(a) Inquiries are solicited for the purpose of offering employment to qualified applicants; or that employment is being held out or made available in any respect.

(b) Graduates of any course of instruction offered by respondents are not required to actively seek employment opportunities through sources other than respondents' placement office; or misrepresenting in any manner, the requirements, duties, obligations or responsibilities imposed upon any person who seeks placement assistance; or misrepresenting in any manner the capabilities or functions of any placement office, referral service or any other type of assistance in obtaining employment for persons completing any said course.

(c) A purchaser will complete any course of instruction offered by respondents within a specified course duration; or misrepresenting orally, visually, or in writing, the length of time required to complete any course of instruction offered by respondents.

(d) The placement assistance furnished by respondents is free or without cost; or misrepresenting orally, visually, or in writing, the cost of any placement assistance or service.

(e) The placement assistance furnished by respondents' is made available to all graduates of respondents' courses of instruction, unless placement assistance of the same kind and quality is made available to each such graduate; or misrepresenting orally, visually, or in writing, the extent of any placement assistance or service furnished by respondents.

(f) Individualized training or instruction is furnished in any course of instruction offered by respondents; or misrepresenting orally, visually, or in writing the nature or quality of instruction offered by respondents.

(g) Respondents offer a tuition finance plan which allows purchasers of respondents' courses of instruction to "train now, pay later," or words of similar import and meaning, unless in each and every instance respondents offer, in the regular course and conduct of their business, a tuition finance plan which operates to defer all tuition payments until after the scheduled completion of training.

(h) (1) There is an urgent need or demand, or a need or demand of any size, proportion or magnitude, for graduates of any course of instruction offered by respondents.

(2) Or otherwise representing orally, visually, or in writing that opportunities for employment, or opportunities of any type or number are available to such persons,

except as hereinafter provided in Paragraph 9(b) of this order. *Provided, however,* That respondents shall cease and desist from making such representations unless the respondents in each and every instance:

(A) Until the passage of a base period to be determined pursuant to Paragraph 9(b) of this order, after the establishment of a new school location by respondents in any metropolitan area or county, whichever is larger, where respondents did not previously operate a school, and after the introduction by respondents of any new course of instruction at any school or location, shall:

(i) have in good faith conducted a statistically valid survey which establishes the validity of any such representation at all times when the representation is made, and

(ii) have disclosed in immediate and conspicuous conjunction with any such representation, that

> All representations of potential employment demand or opportunities for graduates of this school (course) are merely estimates. This school (course) has not been in operation long enough to indicate what, if any, actual employment may result upon graduation.

(B) After the passage of a base period to be determined pursuant to Paragraph 9(b) of this order, and until two years after the establishment of a new school location by respondents in any metropolitan area or county, whichever is larger, where it did not previously operate a school, and after the introduction by respondents of any new course of instruction at any school or location, shall:

(i) make any such representations in the form and manner provided in Paragraph 9(b) of this order, and

(ii) disclose in immediate and conspicuous conjunction with any such representation, that:

> This school (course) has not been in operation long enough to indicate what, if any, actual employment may result upon graduation.

2. Failing to keep adequate records which may be inspected by Commission staff members upon reasonable notice:

(a) Which disclose facts upon which any placement percentages or claims, or other representations of the type described in Paragraphs 1.(h) and 9(b) of this order are based; and

(b) From which the validity of any placement percentages or claims, or other representations of the type described in Paragraphs 1.(h) and 9(b) of this order can be determined.

3. Representing orally, visually, or in writing, directly or by implication, that:

(a) Graduates of respondents' course of instruction are hired by certain local business entities, unless in each and every instance such companies are in fact hiring said graduates in substantial numbers at the time that the representation is made, and in the positions for which such persons have been trained by respondents.

(b) Graduates of respondents' courses are guaranteed a job through respondents' placement office.

(c) A purchaser of any course of instruction offered by respondents is entitled to receive and will receive a full refund of any monies paid as a "reservation fee" if said person cancels his enrollment prior to the commencement of classes; or representing that any refund method, right or privilege is available to purchasers of respondents' courses of instruction, unless said manner of refund is as represented in an integral provision of the written contract used by respondents to sell their courses of instruction.

(d) Any training facilities operated by respondents have standing contractual agreements with local business entities whereby said entities agree to employ the graduates of said facilities; or misrepresenting orally, visually, or in writing the relationship which exists between any of respondents' training facilities and local business entities.

(e) Respondents will place students in part-time employment positions during the time that such students are enrolled in respondents' courses of instruction; or misrepresenting orally, visually, or in writing that any form of employment, remuneration or tuition assistance is available to purchasers of any course of instruction offered by respondents during the time said purchasers are enrolled in respondents' courses of instruction.

(f) Any course of instruction offered by respondents is approved for veterans' education assistance benefits from the United States Government, unless in every instance, each such course is in fact so approved by the appropriate government agency; or misrepresenting orally, visually, or in writing the approval or other form of government action taken with respect to any course of instruction.

4. Failing to place the title "CONTRACT" in bold face type on any document which evidences an agreement between a person and respondents relating to the purchase of one of respondents' courses of instruction; and failing to remove from any such document the word "application," or words of similar import and meaning.

5. Failing to disclose, clearly and conspicuously, orally, visually, or in writing prior to the time that a prospective purchaser of respondents' courses of instruction signs an enrollment contract or contract of sale for any such course where all the necessary equipment to instruct said course is not contained on the premises of respondents' training

facilities, that any particular piece of equipment necessary for instruction is located elsewhere than on the premises of respondents' training facilities and that said purchasers must pay the cost of transportation between said facility and the point where the necessary equipment is located.

6. Failing to offer to refund and refund to purchasers of any course of instruction offered by respondents, in the event that any said course is discontinued by respondents prior to completion, or in the event that any said course is cancelled by respondents before classes begin, the full amount of all tuition monies paid by any said purchaser to respondents; *Provided, however,* That respondents may make available, to any said purchaser, who so selects, a transfer to the same course at a different, specified location where training shall be completed or commenced at no additional cost or change in contractual terms. It is understood and agreed that this paragraph shall become effective with respect to any course of instruction offered by respondents after the date this order is formally accepted by the Commission.

7. Representing orally, visually, or in writing, directly or by implication, that any of respondents' company training facilities or franchises have been or are accredited through the use of the name National Career Education Accrediting Association of Washington, D.C., or any abbreviation or seal of same, or any other similar name, or through the use of any name containing the word "Accrediting" or any other similar word, unless the said organization has been recognized by the United States Office of Education as an official accrediting association.

8. Placing any advertisement in any newspaper or magazine column entitled "Help Wanted," "Employment," "Preparing for Employment" or any other title of similar import or meaning, and failing to include in any advertisement, in a clear and conspicuous manner, the full name of any training facility which places or otherwise disseminates said advertisement.

9. Failing to send by certified mail, return receipt requested, to each person who shall contract with respondents for the purchase of any course of instruction, a written notice printed in at least ten (10) point type which shall disclose in substantially the same form as provided in Appendix A the following information and none other:

(a) The title "IMPORTANT INFORMATION" printed in bold face type across the top of the form;

(b) Paragraphs reciting the following information to be computed in the manner and form set forth below for the applicable base period as hereinafter defined in subparagraph (6);

(1) For each different course of instruction offered by respondents

for each school, location or facility at which respondents offer said courses of instruction;

The dates of the "base period" as computed in (b)(6);

The total number of students who graduated during such base period;

The numbers and percentages of total graduates who attained employment in the fields for which such graduates were trained. Such information must include an accurate description of each position in which such graduates attained employment.

(2) As to the same graduates used to compute the placement and employment statistics in (b)(1) above, a list of all employers which hired any such graduates during the base period, the number of such graduates hired by each firm or employer and the positions in which said graduates were hired.

(3) As to the same graduates used to compute the statistics in (b)(1) and (b)(2) above, the annual salary or income of said graduates. Such salary or income shall be classified by number of graduates attaining employment in each position described in (b)(1) at starting salaries expressed in consecutive categories of one thousand dollar amounts, in the form described in Appendix A.

(4) In compiling the foregoing information respondents shall not include any such graduates who respondents know have not retained such positions for more than one month from the initial date of employment. Respondents may use information supplied to them by graduates, employers, or other sources and shall not be required to obtain such information independently.

(5) For each course of instruction for which respondents are required to disclose information pursuant to subparagraphs (b)(1) through (b)(4), the total number of students who enrolled in said course and were scheduled to graduate during the base period and the number and percentage of the enrollees in said course who failed to complete the course of instruction. The term, "failure to complete," shall encompass those enrollees who:

(A) withdrew;

(B) failed the course (i.e., were academically terminated);

(C) did not complete the course within the base period in which they were scheduled to graduate and must take (a) make-up exam(s) in order to graduate;

(D) completed the course but did not receive a graduation certificate due to their failure to pay the balance of the tuition; or

(E) for any other reason, did not successfully complete the course within the base period in which they were scheduled to graduate.

(6) "Base Period" shall mean a six (6) month period beginning eight

(8) months before and ending two (2) months before the date on which respondents must begin to disseminate the necessary statistics with respect to the base period.

There shall be a one month period immediately following the close of a base period during which respondents shall gather the necessary statistics with respect to said base period. These statistics will relate to those graduates who successfully completed the particular course of instruction during the base period and who obtained employment during the base period or the one month period thereafter. Respondents may not include in the computation of the statistics for the base period any persons who graduate during the month after the base period and who find jobs during said one month period. Such persons will be included in statistics for the base period during which they graduate.

At the end of the first month period immediately following the close of a base period, respondents shall be allowed a second one-month period to calculate and prepare for distribution the necessary statistics with respect to said base period.

On the first day of each month, respondents shall begin to distribute statistics relating to the base period for the period beginning eight months before and ending two months before the first day of each month. Respondents shall continue to distribute said statistics until the first day of the next month and not thereafter.

For any six month period during which respondents have no graduates for a particular course of instruction, respondents may continue to distribute the statistics with respect to the prior base period for said course of instruction until such time as respondents have graduates of said course of instruction and have had one month in which to gather statistics with respect to those graduates and a second month during which to calculate and prepare for distribution the necessary statistics.

Appendix B contains a sample base period calculation.

Provided, however, That subparagraph (b)(1) through (b)(6) above shall be inapplicable to any newly established school that respondents may establish in any metropolitan area or county, whichever is larger, where they did not previously operate a school, or to any course newly introduced by respondents, until such time as the new school or course has been in operation for the base period defined in subparagraph (b)(6) above. The following statement shall be included in such notice during such period:

> All representations of potential employment or salaries are merely estimates. This school (course) has not been in operation (offered) long enough to indicate what, if any, actual employment or salary may result upon graduation from this school (course).

After such time as the new school or course has been in operation for the base period (subparagraph (b)(6) above), and until two years after the establishment of a new school location in any metropolitan area or county, whichever is larger, where they did not previously operate a school, or after the introduction of any new course by respondents, the following statement shall be included in such notice:

> This school (course) has not been in operation (offered) long enough to indicate what, if any, actual employment or salary you may expect to achieve upon graduation from this school (course).

10. Contracting for any sale of any course of instruction in the form of a sales contract or other agreement which shall become binding prior to the purchaser affirming the enrollment contract by signing and returning to respondents the affirmation form specified in Paragraph 11, within ten (10) days of his receipt of that form. If the purchaser fails to affirm the enrollment contract within the ten (10) day period, respondents shall consider the contract null and void and within ten (10) business days of the expiration of the affirmation period shall refund all monies paid by the purchaser and cancel and return to the purchaser any evidence of indebtedness.

11. Failing to send by certified mail, return receipt requested, to each person who shall contract with respondents for the purchase of any course of instruction, a one page form, in duplicate that contains the following unsigned affirmation statement printed in bold face type of at least ten (10) points:

NOTICE TO THE PURCHASER

THE ENROLLMENT CONTRACT THAT YOU SIGNED WITH (NAME OF SCHOOL) ON (DATE) TO ENROLL IN (NAME OF COURSE) IS NOT EFFECTIVE OR VALID UNLESS YOU FIRST SIGN THIS STATEMENT AND RETURN IT TO THE ABOVE NAMED SCHOOL WITHIN TEN (10) DAYS FROM THE TIME THAT YOU RECEIVED THIS STATEMENT. YOU ARE FREE TO CANCEL YOUR ENROLLMENT AND RECEIVE A FULL REFUND OF ANY MONIES YOU HAVE PAID TO THE SCHOOL *BY NOT SIGNING OR MAILING* THIS STATEMENT WITHIN TEN (10) DAYS. AT THE EXPIRATION OF THIS TEN (10) DAY PERIOD THE SCHOOL HAS TEN (10) BUSINESS DAYS TO SEND YOU YOUR REFUND (IF ANY) AND TO CANCEL AND RETURN TO YOU ANY EVIDENCE OF INDEBTEDNESS THAT YOU SIGNED. HOWEVER, IF YOU DO WANT TO ENROLL IN THE ABOVE NAMED SCHOOL, YOU SHOULD SIGN YOUR NAME BELOW AND MAIL THIS STATEMENT TO THE SCHOOL WITHIN TEN (10) DAYS. KEEP THE DUPLICATE COPY FOR YOUR OWN RECORDS.

____________________ (Date)

____________________ (Signature)

The Affirmation Form shall not contain any information or representation other than the information specified in this paragraph, and the Form shall be mailed in the same envelope that is used to mail placement information as required by Paragraph 9. The Affirmation

Form and said placement information shall be sent by respondents no sooner than the next day after the person shall have contracted for the purchase of any course of instruction. During such period provided for in this paragraph, respondents shall not initiate contact with such person other than that required by this paragraph.

12. Making any representation of any kind whatsoever in connection with the creating, advertising, promoting, offering for sale, sale or distribution of courses of study, training or instruction in any course offered to the public in any field in commerce, for which respondents have no reasonable basis prior to the making or dissemination thereof.

13. Using course names and descriptions which either directly or by implication indicate that respondents' courses are designed to prepare students for certain entry-level positions when in fact a substantial number of graduates of such courses do not achieve such entry-level positions.

14. Representing orally, visually, or in writing, directly or by implication, that purchasers of franchises will receive advice or assistance for maintaining or operating any business, or will receive a franchise that places its graduates in positions of employment; unless respondents have a reasonable basis for each such statement or representation and maintain and upon reasonable notice provide access to the Commission or its representatives for purposes of inspection or copying, for a period of three (3) years after each such statement or representation, full, complete and accurate records which will disclose:

(a) The time, frequency and duration of use or publication, and the content of each such statement or representation, and details as to the media or other means utilized in its dissemination or publication, and

(b) A factual, documented and verifiable basis for substantiation of each such statement or representation. *Provided further*, That with respect to any statement or representation as to placement or employment, such substantiation shall include a list of firms or employers which are currently hiring graduates of such courses in substantial numbers and in the positions for which such graduates have been trained, and the salary range of such graduates, computed in the manner provided in Paragraph 9 above.

15. Failing to furnish any prospective franchisee with the following information in a legible, written document, at the earlier of the time (1) when the first personal meeting for the purpose of discussing the possible sale of a franchise occurs between such prospective franchisee and the franchisor or its sales representative; or (2) at least fifteen (15) business days prior to the execution by the prospective franchisee of any franchise agreement or any other binding obligation, or the

payment by the prospective franchisee of any consideration in connection with the sale or proposed sale of a franchise:

(a) A distinctive and conspicuous cover sheet with the following notice in bold face type of not less than ten (10) point size, and containing no other promotional claims or other information not required by state law:

(1) INFORMATION FOR PROSPECTIVE FRANCHISEES REQUIRED BY FEDERAL TRADE COMMISSION

This information is provided for your own protection. It is in your best interest to study it carefully before making any commitment. The information contained herein has not been reviewed or approved by the Federal Trade Commission, but any misrepresentation may constitute a violation of Federal law.

(2) If you do sign a contract, you may cancel it and promptly obtain a full refund of any money paid, for any reason, within ten (10) business days after either signing such contract or receiving this disclosure statement, whichever occurs later.

(b) A detachable form which a franchisee may use as a notice of cancellation, which indicates the proper address of accomplishing any such cancellation.

(c) (1) The trade name(s) or trademark(s) under which the franchisor and the prospective franchisee will be doing business; (2) the official name(s) and address(es) and principal place(s) of business of the franchisor, the parent firm or holding company of franchisor, if any; and (3) all persons the franchisee is required or is suggested to do business with by the franchisor which have a substantial connection with the franchisor.

(d) The business experience stated individually of each of the franchisor's directors and chief executive officers including the biographical data concerning all such persons; except, however, that the information required by this subparagraph need not be disclosed where the franchisor is a listed company on a national stock exchange, although such fact shall be disclosed.

(e) The business experience of the franchisor, including the length of time the franchisor has conducted a business of the type to be operated by the franchisee; has granted franchises for such business; and has granted franchises in other lines of business.

(f) A certified balance sheet for the most recent year, a certified profit and loss statement for the most recent three (3) year period, and a statement of any material changes in the financial soundness of the franchisor since the date of such financial statements.

(g) Where such is the case, a statement that the franchisor or any of its current directors or chief executive officers:

(1) has been held liable in a civil action by final judgment, convicted of a felony or plead *nolo contendere* to a felony charge if such felony or civil action involved fraud, embezzlement, fraudulent conversion or misappropriation of property for the most recent seven (7) year period.

(2) is subject to any currently effective State or federal agency injunctive or restrictive order relating to or affecting franchise activities or the franchisor/franchisee relationship.

(3) has filed in bankruptcy or has been associated as a director or chief executive officer of any company that has filed bankruptcy or reorganization proceedings for the most recent seven (7) year period.

(4) has been a party to any cause of action brought by franchisees against the franchisor for the most recent seven (7) year period which resulted either in an out of court settlement or a judgment against the franchisor.

(5) is presently a party to any cause of action brought by a franchisee against the franchisor.

Such statement shall set forth the identity and location of the court, date of conviction or judgment, and penalty imposed or damages assessed, and the date, nature, and issuer of each such order or ruling.

(h) A factual description of the franchise offered to be sold.

(i) (1) A statement of the total funds which must be paid by the franchisee to the franchisor or to a person having a substantial connection with the franchisor, in order to obtain or commence the franchise operation, such as deposits, downpayments and fees.

(2) If all or part of these fees or deposits are returnable under certain conditions, these conditions should be set forth; and if not returnable such fact so disclosed.

(j) A statement describing the recurring fees required to be paid, in connection with carrying on the franchise business, by the franchisee to the franchisor or to persons having a substantial connection with the franchisor, including but not limited to royalty, lease, advertising, training, and sign rental fees.

(k) A statement disclosing (1) the number of franchises and company-owned outlets operating at the end of the last calendar year, and (2) the names and addresses of the ten (10) franchises or company-owned outlets nearest the prospective franchisee's intended location, indicating which units are company-owned outlets.

(1) A statement of the number of franchises, if any, that operated at a loss during the previous year.

(m) A statement describing any real estate, services, supplies, products, signs, fixtures or equipment relating to the establishment or the operation of the franchise business which the franchisee is required to purchase, lease or rent directly or indirectly from the franchisor or persons having substantial connection with the franchisor.

(n) A description of the basis and the amount of any revenue or other consideration to be received by the franchisor, or persons having a substantial connection with the franchisor, from suppliers to the prospective franchisee in consideration for goods or services required or suggested to be purchased by the franchisee.

(o) (1) A statement of the terms and conditions of any financing arrangement offered directly or indirectly by the franchisor or any person having a substantial connection with the franchisor, and

(2) A description of any payments received by the franchisor from any person for the placement of financing with such person.

(p) A statement whether, by the terms of the franchise agreement or other device or practice, the franchisee is limited in the goods or services he may offer for sale, or limited in the customers to whom he may sell such goods or services.

(q) A statement of the extent to which the franchisor requires the franchisee to participate personally in the direct operation of the franchise.

(r) A statement disclosing:

(1) the conditions and terms under which the franchisor allows the franchisee to sell, lease, assign, or otherwise transfer his franchise, or any interest therein, and

(2) the amount of consideration which must be paid to the franchisor for such sale, lease, assignment or transfer, if any.

(s) A statement disclosing:

(1) the conditions under which the franchise agreement may be terminated by the franchisor, renewal may be refused, or the franchise may be repurchased by the franchisor at its option;

(2) the number, stated for each category, of franchises which were terminated, renewal refused or repurchased during the preceding calendar year and a complete explanation thereof; and

(3) the conditions under which the franchise agreement may be terminated by the franchisee and the number of franchises voluntarily terminated by franchisees during the preceding calendar year.

(t) If site selection is involved, a statement disclosing the range of time that has elapsed in the preceding calendar year, between signing of a franchise agreement and site selection. If, in addition, operating units are to be provided, a statement disclosing the range of time that has elapsed in the preceding calendar year between the signing of the franchise agreement and opening of the franchise outlet.

(u) If the franchisor offers a training program or informs the prospective franchisee that it intends to provide him with training; the franchisor must specify the specific type and nature of the training, the number of hours or days of instruction, and the cost to the franchisee, if any.

(v) If a franchisor uses the name of a "public figure" in connection with the recommendation of the franchise or as a part of the name of the franchise operation, a statement disclosing: (1) the nature and extent of the public figure's involvement and obligations to the franchisor, including but not limited to the promotional assistance the public figure will provide to the franchisor and to the franchisee; (2) the total investment of the public figure in the franchise operation; and (3) the amount of any fees the franchisee will be obligated to pay for such involvement and assistance provided by the public figure.

(w) A statement explaining clearly the terms and conditions of any covenant not to compete which a franchisee may be required to enter into.

16. *It is further ordered*, That in addition to the information required by Paragraph 15 above, respondents Fortune Enterprises, Inc. and William L. Phillips, in connection with the creating, advertising, promoting, offering for sale or distribution of franchises for courses of study, training, or instruction, shall disclose to any such prospective franchisee in the same manner and form as prescribed in Paragraph 15 above:

(a) The placement percentage for graduates as computed in the following manner: Separately for each course of instruction offered by each of the said franchises at which franchisees conduct business or offer any course of instruction, and during the six month period immediately preceding such computation, the total number of graduates during said period divided into the total number of such graduates who during said period, within the actual knowledge of such school, location or facility, attained employment in the entry-level positions for which said graduates were trained.

(b) The percentage of enrollees, during the past six months, separately for each course of instruction offered by each of the said franchises, who have failed to complete their courses of instructions.

(c) A list of firms or employers which are currently hiring graduates of respondents' courses in substantial numbers and in the positions for which such graduates have been trained, as to the same graduates used to compute the placement percentage in (a) above.

(d) The salary range achieved by the same graduates used to compute the placement percentage in (a) above, based upon a statistically valid survey conducted in good faith at each location or facility where franchises offer training.

17. *It is further ordered*, That respondents Fortune Enterprises, Inc. and William L, Phillips shall not:

(a) Make any oral or written representation of a prospective franchisee's potential sales, income, gross or net profit unless:

(1) such sales, income or profits are reasonably likely to be achieved by the person to whom the representation is made;

(2) the basis and assumptions for such representation are set forth in detail;

(3) such representation and the underlying data have been prepared in accordance with generally accepted accounting principles;

(4) in immediate conjunction therewith, the following statement is clearly and conspicuously disclosed:

THERE IS NO ASSURANCE THAT INCOME AND PROFIT PROJECTIONS WILL BE ATTAINED BY ANY SPECIFIC FRANCHISEE. THEY ARE MERELY ESTIMATES; and

(5) the amounts represented are not in excess of sales, income or profits actually achieved by existing franchises. If franchises have not been in operation long enough to indicate what sales, income or profits may result, then representations of such to a prospective franchisee are prohibited.

(b) Make any claim with respect to past or potential sales, profits, or earnings in any advertising, promotional material, or disclosure statement, or in any oral sales presentation, or discussion between a franchisor's representatives and prospective franchisees, for which the franchisor does not have substantiation in its possession, which substantiation shall be made available to prospective franchisees or the Commission or its staff upon demand.

(c) Make any claim or representation in advertising or promotional material, or in any oral sales presentation, solicitation or discussion between a franchisor's representatives and prospective franchisees, which is inconsistent with the information required to be disclosed by this order.

(d) Fail to furnish the prospective franchisee with a copy of the completed franchise agreement which shall not become binding prior to the end of the tenth (10th) day after the date of receipt by the customer of the form of notice provided for in Paragraph 15 of this order.

(e) Fail to orally explain to the prospective franchisee, before an agreement is consummated, the cancellation procedure provided in this order, namely that any contract or other agreement may be cancelled for any reason within ten (10) business days after the contract becomes legally binding on both parties or after the franchisee receives this disclosure statement, whichever occurs later.

(f) Fail to return the funds or deposits in accordance with subparagraph 15(i) of this order.

18. For the purpose of this order, the term "in connection with the creating, advertising, promoting, offering for sale or distribution" of any franchise for any product or service shall not include a relationship between respondents and any natural person, partnership, corporation, group, association, or any other business entity involving the mere investment of money.

19. For the purpose of this order, the term "franchise" shall incorporate by reference the first alternative definition of "franchise" contained in the Federal Trade Commission's revised Proposed Trade Regulation Rule on Disclosure Requirements And Prohibitions Concerning Franchising published at 39 F. R. 30362.

20. *It is further ordered*, That in the event the Federal Trade Commission promulgates a final Trade Regulation Rule on Disclosure Requirements And Prohibitions Concerning Franchising, then such Trade Regulation Rule shall completely supersede and replace all franchise provisions contained in this order, except Paragraphs 14, 16, 18 and subparagraphs 15(a)(2), 15(b), 15(1), 17(d) and 17(e), and such trade regulation rule shall become a part of this order.

II

1. *It is further ordered*, That Fortune Enterprises, Inc. and William L. Phillips:

(a) Deliver a copy of this order by hand or by certified mail to each of their present and future franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors or to any other person or entity which promotes, offers for sale, sells or distributes any course of instruction offered by respondents; provided however, with respect to any other franchise for any other product or service, respondents shall deliver to such persons described above a copy of those paragraphs in Part I of this order applicable to franchising such other products or services and Part II;

(b) Provide each person or entity described in subparagraph (a) above with a form returnable to the respondents clearly stating his (its) intention to be bound by and to conform his (its) business practices to the requirements of this order; retain said statement during the period said person or entity is so engaged; and make said statement available to the Commission's staff for inspection and copying upon request;

(c) Inform each person or entity described in subparagraph (a) above that the respondents will not use or engage or will terminate the use or engagement of any such person or entity, unless such person or entity agrees to and does file notice with the respondents that he (it) will be bound by the provisions contained in this order;

(d) Shall not, if such person or entity as described in subparagraph (a) above will not agree to so file the notice set forth in subparagraph (b) above with the respondents and be bound by the provisions of the order, use or engage or continue the use or engagement of such person or entity to promote, offer for sale, sell or distribute any course of instruction or franchise included in this order;

(e) Inform each person or entity described in subparagraph (a) above that the respondents are obligated by this order to discontinue dealing with or to terminate the use or engagement of persons or entities who continue on their own the deceptive acts or practices prohibited by this order;

(f) Institute a program of continuing surveillance adequate to reveal whether the business practices of each said person or entity described in subparagraph (a) above conform to the requirements of this order;

(g) Discontinue dealing with or terminate the use or engagement of any person or entity described in subparagraph (a) above, as revealed by the aforesaid program of surveillance, who continues on his (its) own any act or practice prohibited by this order.

2. *It is further ordered*, That respondents Fortune Enterprises, Inc. and William L. Phillips shall forthwith distribute a copy of this order to each of their operating divisions which promotes, offers for sale, sells or distributes any course of instruction or franchise offered by respondents.

3. *It is further ordered*, That respondents Fortune Enterprises, Inc. and William L. Phillips shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in respondents which may affect compliance obligations arising out of this order.

4. *It is further ordered*, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business or employment in which he is engaged as well as a description of his duties and responsibilities.

III

1. *It is further ordered*, That respondents Fuqua Industries, Inc. ("Fuqua") and William L. Phillips ("Phillips") shall each within sixty (60) days from the effective date of this order, compile a list from Career Enterprises, Inc. ("Career") records in their respective possession, custody or control, or any other records in their respective possession, custody, or control, of the last known names and addresses of all persons who purchased a Career course of instruction in a

company-owned or franchise school of Career and who first paid monies to Career from Jan. 1, 1969 to July 17, 1972, including the names and addresses of the purchasers' nearest relative(s) or others whose addresses appear on any document relating to said purchaser, supplemented by a list of the same category of persons identified by the Commission and transmitted to said respondents within one hundred five (105) days after the effective date of this order.

2. *It is further ordered*, That respondents Fuqua and Phillips shall jointly, within sixty (60) days from the effective date of this order, employ an independent contractor acceptable to the Commission, and give to the independent contractor, within one hundred ten (110) days from the effective date of this order, the lists of names and addresses of persons referred to in Paragraph 1 above. Said independent contractor shall review the lists, strike out any duplication of names and addresses of persons who purchased a Career course of instruction, and shall prepare a final list of all persons to receive Appendices C and D. Said independent contractor shall make an inquiry in writing on the one hundred fiftieth (150th) day after the effective date of this order, to all persons whose names and addresses appear on the final list, in the language, manner and form shown in Appendices C and D, by first class mail and with a self-addressed postage prepaid envelope. With respect to all persons whose first mailed inquiry is returned unopened said independent contractor shall have a duty, commencing within three (3) business days after such mailed inquiry is returned unopened, to attempt to establish contact with persons referred to above by requesting by mail new addresses from the students' nearest relative(s) or others whose addresses appear on any document supplied to the independent contractor through which a student may be located.

3. *It is further ordered*, That (a) at the expiration of ninety (90) days after the independent contractor first mails Appendices C and D to persons on the final list referred to in Paragraph 2 above, the independent contractor shall transmit the Appendix D responses it has received by such date to respondents Fuqua and Phillips, and (b) respondents' obligation to make restitution shall extend only to such persons (i) whose names appear on the final list referred to in Paragraph 2 above and (ii) whose Appendix D responses have been received by the independent contractor at or before the expiration of said ninety (90) day period.

4. *It is further ordered*, That, within one hundred fifty (150) days after the independent contractor first mails Appendices C and D to persons on the final list referred to in Paragraph 2 above, respondents Fuqua and Phillips shall refund to purchasers of Career courses of instruction whose names appear on the Appendix D responses

transmitted by the independent contractor pursuant to Paragraph 3 above, less any prior refunds, seventy-five percent (75%) per person, of the total amount of monies paid by such persons to Career, or paid or owed by such persons to any third party financial institution or individual by virtue of the third party's purchase of a contractual debt owed by such persons to Career with respect to such enrollment or instruction; *Provided, however,* That this order provision shall not apply to any such person who paid less than one hundred dollars and one cent ($100.01) with respect to enrollment or instruction in a Career course, or who attained an employment position as a result of or substantially related to the training received in the course of instruction purchased from or arranged by Career, or who, for reasons unrelated to the training or job demand, elected not to seek such employment, or who made a deposit but did not show up for classes, or who enrolled in a class and dropped out for reasons unrelated to the course of instruction or job demand; and provided further that respondents' obligation to make refunds of any nature whatsoever under this order provision and as contemplated by the complaint herein shall expire in all respects at the end of two hundred ten (210) days after the date on which the independent contractor first mails inquiries to purchasers of Career courses of instruction. It is understood and agreed and adopted as part of this order that respondents' liability for restitution shall not exceed one million two hundred fifty thousand dollars ($1,250,000); and in the event that this sum is not adequate to provide a refund of seventy-five percent (75 %) of the total monies paid by persons eligible to receive a refund as set forth in this paragraph, then a proportionate percentage of the 75 percent refund due shall be paid to those persons eligible until the $1,250,000 has been exhausted. Respondents Fuqua and Phillips shall bear equally the expense of making the restitution payments referred to in this paragraph, provided that in the event the total amount of restitution payments exceeds one million dollars ($1,000,000), Fuqua shall bear the expense of making restitution payments in excess of one million dollars ($1,000,000), up to one million two hundred fifty thousand dollars ($1,250,000). In no event shall the total amount of Fuqua's liability to make restitution exceed one-half of restitution payments up to and including one million dollars ($1,000,000), or, in the event the restitution payments required by this order exceed one million dollars ($1,000,000), said one-half share, plus the amount of any required restitution payments over one million dollars ($1,000,000), up to one million two hundred fifty thousand dollars ($1,250,000), for a total maximum Fuqua liability of seven hundred fifty thousand dollars ($750,000). In no event shall the total amount of Phillips' liability to make restitution payments exceed five hundred thousand dollars

($500,000) or one-half of the restitution payments up to one million dollars ($1,000,000), whichever is less. It is further ordered that respondents Fuqua and Phillips' liability for restitution arising out of any of the acts or practices of Career does not and shall not extend to any other period of time or class of claimant other than as provided in this order.

5. *It is further ordered*, That if an independent contractor acceptable to the Commission is not employed by respondents Fuqua and Phillips within sixty (60) days from the effective date of this order, then: (i) said independent contractor shall have ninety (90) days from the time of his employment to prepare the final list and to make the inquiry in writing referred to in Paragraph 2 above, and (ii) said respondents' liability to make refunds shall not expire until two hundred ten (210) days after the date on which the independent contractor first mails inquiries to purchasers of Career courses of instruction.

6. *It is further ordered*, That respondents Fuqua and Phillips shall maintain adequate records for two (2) years after the effective date of this order, same to be furnished upon request by the Federal Trade Commission, which disclose the dates and manner in which persons were contacted and responded pursuant to the above procedures including all documents received from such persons.

7. *It is further ordered*, That the respondents Fuqua Industries, Inc., Fortune Enterprises, Inc., and William L. Phillips shall notify the Commission at least thirty (30) days prior to any proposed change in the respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in respondents which may affect compliance obligations arising out of this order.

8. *It is further ordered*, That each respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth the manner and form in which each has complied with this order, and shall, within two hundred seventy (270) days after the independent contractor first mails the inquiries referred to in Paragraph 2 above, file with the Commission a report in writing setting forth the manner and form in which each has complied with Part III of this Order.

APPENDIX A

IMPORTANT INFORMATION

Regarding Students of Career Training Institute of New York, New York

Course: Keypunch Operator

Base Period: Jan. 1, 1974 through June 30, 1974

Information Regarding Post-Graduate Employment of Graduates:

	Number	*Percent**
Total graduates	80	100%
Total graduates obtaining employment as keypunch operators	16	20%

Employers Hiring Persons Who Graduated From Career Training Institute of New York, New York From Jan. 1, 1974 Through June 30, 1974:

As Keypunch Operators	Total Hired
ABC Company	4
D _____ Company	4
H _____ & Sons	4
L _____ Company	4

Salary Information Regarding Persons Who Graduated From Career Training Institute of New York, New York From Jan. 1, 1974 Through June 30, 1974:

As Keypunch Operators:

4 Graduate(s) began at a salary between $5,000 and 5,999

6 Graduate(s) began at a salary between $6,000 and 6,999

6 Graduate(s) began at a salary between $7,000 and 7,999

Information Regarding Total Number and Percentage Who Failed to Complete This Course:

Total number of students enrolled in this course and scheduled to graduate from Jan. 1, 1974 through June 30, 1974: 240

Total number who failed to complete this course: 160

Total percentage who failed to complete this course: 66%

APPENDIX B

Base Period 1 begins Jan. 1, 1974 and ends June 30, 1974

During July, respondents shall gather the statistics with respect to Base Period 1. These statistics shall include the required information regarding jobs obtained by the Jan.-June graduates from Jan. 1 through July 31. These statistics may not include any persons who graduate during July and who obtain employment before July 31. Those persons will be included in the statistics for Base Period 2. During August respondents shall calculate and prepare the Base Period 1 statistics for distribution.

On Sept. 1, respondents shall begin to disseminate statistics with respect to graduates for the period Jan. 1 through June 30, and respondents shall continue to use those statistics through Sept. 30.

During August, respondents shall gather the statistics with respect to Base Period 2, which begins Feb. 1, 1974, and ends July 31, 1974. These statistics shall include the required information regarding jobs obtained by the Feb.-July graduates from February through August 31. During Sept., respondents shall calculate and prepare for distribution the necessary statistics.

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* The examples in this Appendix are for illustration and are not based on actual statistics.

Beginning Oct. 1, respondents shall disseminate the necessary statistics for Base Period 2 and shall be prohibited from disseminating previous base period statistics.

APPENDIX C

IMPORTANT NOTICE

TO: (Name of Addressee)

SUBJECT: Your attendance at (Name of School and City), a Career Enterprises, Inc. school

By an order of the United States Federal Trade Commission entered on (date of order), we have been directed to determine from you certain facts concerning your relationship with the above Career school. The Commission has determined that the collection of this information is required under the Federal Trade Commission Act to properly implement a Commission order that requires the undersigned individual and Fuqua Industries, Inc. to meet certain obligations with respect to former enrollees of this school. It is important, therefore, that you provide us with your response to the enclosed questionnaire as soon as possible so that we may comply with the Commission's order.

Please mark or fill-in the appropriate spaces on the enclosed statement and return it by the self-addressed, stamped envelope within seven (7) days to:

[Independent Contractor]
[Name and Address]
[Telephone No.]

If you have any questions regarding this letter, please contact the above company. Your cooperation in this matter will be appreciated.

____
William L. Phillips
Former Chairman of the Board
of Career Enterprises, Inc.

APPENDIX D

SUBJECT: Your attendance at (Name of School and City), a Career Enterprises, Inc. school

1. Is your present address correctly shown on the envelope? Yes ( ) No ( ) If no, what is your address?
2. On what date did you enroll in the above Career school?

____________________ ____________________
Month Year

3. What is the total amount of money you paid for your course of the above Career school? In computing this amount, include both the amount you paid directly to the Career school, and the amount, if any, paid for such course to Career by any financial institution or individual who informed you that your debt obligation has been transferred from the Career school to such financial institution or individual and that, therefore, in the future you would not make payments on your tuition to the Career school, but would make such payments to the financial institution or individual who informed you of this new arrangement. (Total amount $ ____________).
4. What is the name and address of this financial institution or individual?
5. What is the name of the course you signed up for?
6. Did you attend any classes? Yes ( ) No ( )
7. Did you complete the course? Yes ( ) No ( )

8. If the answer to question number 7 is no, set forth reason.

9. Did you receive any refund of any tuition money paid to the above Career school? Yes ( ) No ( )

(If the answer to question number 9 is yes, please answer question number 10).

10. What is the total amount of such refunds received by you?

(Total amount $ ____________________________).

11. Did you ever attain any employment positions as a result of, or substantially relating to, the training you received from the Career school? Yes ( ) No ( )

12. If no, why not?

13. Please attach to this form any documents or copies of such documents that indicate you paid an amount of money for any course of instruction offered by the Career school.

This form should be signed and mailed, in the enclosed self-addressed postage paid envelope.

I HEREBY CERTIFY THAT THE ABOVE ANSWERS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

____________________ (Date)	____________________ (Signature)
____________________ (Social Security No.)	____________________ (Print Name Here)
	____________________ (Home Address)
	____________________ ____________________ (Home Telephone No.)
	____________________ (Employer)
	____________________ ____________________ (Employer's Address)
	____________________ (Employer's Telephone No.)

In the Matter of

FEDERATED SANITARY CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2627. Complaint, Jan. 27, 1975 - Decision, Jan. 27, 1975

Consent order requiring a New Rochelle, N.Y., seller and distributor of toilet bowl cleaners, air refreshers and other products to salesmen, franchisees and other distributors, among other things to cease misrepresenting earnings and profits of franchisees; misrepresenting the number of individuals engaged in the sale of respondents' products; using false testimonials, and failing to make certain disclosures to prospective franchisees.

Appearances

For the Commission: *Moira P. McDermott.*

For the respondents: *Sidney Schreiberg,* New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Federated Sanitary Corp., a corporation, and Harry Wessel, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, having violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Federated Sanitary Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 65 Plain Ave., New Rochelle, N.Y.

Respondent Harry Wessel is an officer of Federated Sanitary Corp. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of toilet bowl cleaners, air refreshers and other products to salesmen, franchisees and other distributors for resale. The toilet bowl cleaners and air refreshers are sold under the trade names of Toil-Ease, Flora-Scent and Petite.

PAR. 3. In the course and conduct of their business as aforesaid, respondents cause advertising concerning the sale and distribution of said products to be published in magazines which have interstate circulation and have caused sales brochures and promotional materials and said products to be mailed or otherwise shipped from their place of business in the State of New York to salesmen, franchisees and other distributors in various other States of the United States and the District of Columbia. Respondents maintain and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid and for the purpose of inducing prospective salesmen, franchisees and other distributors to purchase and resell said products, the respondents have made, and are now making numerous statements in said promotional materials and other advertisements with respect to the benefits of distributing said products or undertaking franchises for the sale of said products.

Typical and illustrative of said statements, but not all inclusive thereof, are the following:

> * * * And here's how easy it will be for you to be appointed the Toil-Ease [Petite] Franchise Distributor for your important territory.
>
> Since the quota for your County is 48 dozen units of Toil-Ease [Petite] at the Franchise Dealer's rock-bottom cost of $8.76 per dozen - ($420.48) - all you need to do is rush me your remittance of either a Cashier's Check or Certified Check in this amount of $420.48 covering your order for the 48 dozen units of Toil-Ease Petite * * *.
>
> * * * * * * *
>
> * * * And here's how easy it will be for you to be appointed the Flora-Scent Franchise Distributor for your important territory.
>
> Since the quota for your County is 36 dozen units of Flora-Scent at the Franchise Dealer's rock-bottom cost of $14.52 per dozen - ($522.72) - all you need to do is rush me your remittance of either a Cashier's Check or Certified Check in this amount of $522.72 covering your order for the 36 dozen units of Flora-Scent* * *.
>
> * * * * * * *
>
> There are no extra charges or fees of any kind for securing a [Toil-Ease or Flora-Scent] Franchise. . . . and it can be yours for life - and can be sold, transferred, or passed on to your children, if and when you decide to retire!
>
> * * * * * * *
>
> I have pocketed as much as $100.00 for a half day of work* * *.
>
> * * * * * * *
>
> Average weekly profits of $1,000.00 plus* * * 75 percent repeat business.
>
> * * * * * * *
>
> CALL THEM ON US!
>
> These are some of the thousands of people making it with Federated Sanitary Corporation.
>
> * * * * * * *
>
> The biggest sales I've made to date have been to organizations in my town that use "Petite" to raise money for charity and other worthwhile services* * *, clubs, churches, Boy Scouts, Girl Scouts, etc.
>
> * * * * * * *
>
> Here Are Excerpts From Just a Few of the Scores of Letters in Our Files, Telling How Flora-Scent Salesmen Are "Cleaning" Up!

* * * * * * *

Recently a national sales magazine published an article about L. A. Coleman, Toil-Ease distributor in Utah.

PAR. 5. By and through the use of the above-quoted statements, and others of similar import and meaning, but not expressly set out herein, respondents have represented, and are now representing, directly or by implication:

1. That obtaining and holding a franchise or distributorship is solely conditional upon an initial purchase of, for example, 48 dozen units of "Toil-Ease" or "Petite," or of 36 units of "Flora-Scent."
2. That salesmen, franchisees or other distributors of said products earn or realize $1000 per week full time or $100 per half day, spare time, or other stated amounts of earnings or profits.
3. That thousands of persons are engaged as salesmen, franchisees or other distributors of said products.
4. That the testimonials quoted in said advertisements and promotional material are bona fide statements by salesmen, franchisees, or other distributors engaged in the sale of respondents' products.
5. That articles which have appeared in trade magazines about respondents' salesmen, franchises or other distributors have been independently written and published.

PAR. 6. In truth and in fact:

1. Obtaining and holding a franchise or distributorship is not solely conditional upon an initial purchase. To the contrary, respondents frequently require that additional purchases be made on a monthly or other basis, and do not disclose the material fact that failure to make the additional purchases, may be treated as a condition for terminating the franchise.
2. Few, if any, salesmen, franchisees or other distributors earn $1000 per week full time or $100 per half day, spare time, or other amounts set forth in respondents' advertisements and promotional material. To the contrary said salesmen, franchisees or other distributors, in the main, earn substantially less than those respective amounts.
3. Respondents have substantially fewer than a thousand salesmen, franchisees or other distributors regularly engaged in the sale of said products. Furthermore, many of said persons have purchased only a few small orders.
4. The testimonials quoted in said advertisements and promotional material are not bona fide statements by salesmen, franchisees or other distributors engaged in the sale of respondents' products. To the contrary, a substantial number of these persons have never dealt with the respondents.
5. Articles which have appeared in trade magazines and which were

reprinted and included in the respondents' promotional mailings or were quoted in publicity material included in the mailings were not independently written and published but were "puff editorials" which were solicited by the respondents and were either prepared by the respondents or respondents' agents or from material submitted by the respondents.

Therefore, respondents' statements and representations and their failure to disclose material facts, as set forth in Paragraphs Four, Five and Six hereof, were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business as aforesaid, respondents have misquoted, exaggerated and otherwise distorted testimonial statements and endorsements received from purchasers of their products. Typical and illustrative of said practice, but not all inclusive thereof, are the following:

Respondents' Version of Purchaser's Statement	*Actual Statement*
Repeat orders are fantastic!	There is no problem getting repeat orders.
Can't get enough order blanks-everyone wants these items!	* * *wish I had more time this month to sell your product. You see I am a post office employee so it is hard for me to get time off because of the holidays. I am sure I can move Flora-Scent. P.S. My last order took almost three weeks to get to me. Please send me some more order blanks* * *.
Been selling for 15 years - nothing compares with Federated. One of the best! Great order demands!	* * *none of them compare with Toil-Ease. Toil-Ease is one of the best to clean toilets I've ever seen and keep them clean and does not harm the drain pipes.

Therefore, respondents' practice of misquoting, exaggerating and otherwise distorting testimonial statements and endorsements received from purchasers of their products, as set forth in Paragraph Seven hereof, was and is false, misleading and deceptive.

PAR. 8. In the course and conduct of its business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of articles of merchandise and services of the same general kind and nature as those sold by respondents.

PAR. 9. The use by the respondents of the aforesaid false, deceptive and misleading statements and representations and their failure to disclose material facts has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34)b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Federated Sanitary Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 65 Plain Ave., New Rochelle, N.Y.

Respondent Harry Wessel is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Federated Sanitary Corp., a corporation, its successors and assigns, and its officers, and Harry Wessel, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of toilet bowl cleaners, air refreshers, or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that individuals will earn any stated gross or net amount, or representing, in any manner, the past earnings of individuals where such profits represent unusual earnings by a small percentage of individuals unless the pertinent facts with reference to such earnings are disclosed: for example, full or part-time employment or whether the individual operates alone or employs a staff.

2. Representing, directly or by implication, a prospective franchisee's potential income or gross or net profits unless such representation is based upon the actual average figures for all franchises and distributorships in operation during the entire preceding twelve-month period and unless there is disclosed clearly and conspicuously immediately adjacent to any such representation that "REPRESENTATIONS ARE BASED ON THE AVERAGE EARNINGS OR PROFITS OF ALL FRANCHISES AND DISTRIBUTORSHIPS IN OPERATION DURING THE PAST YEAR. THESE FIGURES SHOULD NOT BE CONSIDERED AS ACCURATE REPRESENTATIONS OF POTENTIAL EARNINGS OR PROFITS OF ANY SPECIFIC FRANCHISEE OR DISTRIBUTOR."

3. Misrepresenting, directly or by implication, the number of individuals regularly engaged in the sale or distribution of respondents' products.

4. Using testimonials from individuals who did not purchase from the respondent corporation the products covered by the testimonials.

5. Failing to furnish any prospective distributor or franchisee, in a

separate written statement in a clear and concise manner, prior to the consummation of any contracts between respondents and any such prospective distributor or franchisee:

A. The conditions under which the franchise or distributorship agreement may be terminated or renewal refused by respondents, and a statement of the number of franchises or distributorships which were terminated or renewal refused in the past calendar year.

B. Complete financial details pertaining to the distributor or franchise agreement including the amount to be paid by the distributor or franchisee for the distributorship or franchise, the amount to be paid for any services to be rendered by respondents and the amount to be paid for any merchandise offered for sale or sold thereunder.

C. The median and mean gross sales to respondents' franchisees or distributors, exclusive of initial inventories sold to new franchisees or distributors, during the 12-month period preceding the month in which the information is to be furnished.

D. The number of franchisees or distributors at the beginning of the 12-month period, the number appointed during the 12-month period, the number terminated during the 12-month period, the number retained at the end of the 12-month period, and the median and mean length of time that those retained at the end of the 12-month period have been respondents' franchisees or distributors.

6. Using reprints of magazine articles, describing the experience of respondents' salesmen, distributors or franchisees with the respondents' products when such articles are suggested, drafted or prepared by respondents or on their behalf, unless it is clearly indicated that said articles were initiated by the respondents.

7. Misquoting, exaggerating or otherwise distorting statements from purchasers.

It is further ordered, That respondents furnish any prospective franchisee or distributor a copy of the franchise or distributorship agreement proposed to be used reasonably prior to the date the agreement is to be consummated or payment is to be made by the prospective franchisee or distributor for such franchise or distributorship.

It is further ordered, That respondents maintain files containing all inquiries or complaints from any source relating to acts or practices prohibited by this order, for a period of two years after their receipt, and that such files be made available for examination and copying by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondents' business.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future office personnel employed directly by respondents and to all persons engaged in the offering for sale or sale of respondents' distributorships or franchises or in any aspect of preparation, creation or placing of advertising and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of or the statutes administered by the Federal Trade Commission.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

TOWN FINANCE CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2628. Complaint, Jan. 27, 1975 - Decision, Jan. 27, 1975

Consent order requiring a Bristol, R.I., moneylender in connection with financing insurance premiums, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the

extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *William P. McDonough.*

For the respondents: *Levy, Goodman, Semonoff & Gorin*, Providence, R.I.

COMPLAINT

Pursuant to the provisions of the Truth In Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Town Finance Corp., a corporation, and John Andrade, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Town Finance Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 557 Hope St., Bristol, R.I.

Respondent John Andrade is an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporation, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the business of lending money to the public in connection with the financing of insurance premiums.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend and for some time last past have regularly extended consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth In Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, have caused and are causing to be extended consumer credit, as "consumer credit" is defined in Regulation Z, and have caused and are causing customers to execute a binding insurance premium financing contract, hereinafter referred to as the "contract." Respondents do not provide these customers with any other consumer credit cost disclosures.

By and through the use of the "contract" respondents:

1. Failed to use the term "cash price" as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the transaction, as required by Section 226.8(c)(1) of Regulation Z.

2. Failed to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8 (c)(2) of Regulation Z.

3. Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

4. Failed to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

5. Failed to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

6. Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

7. Failed to print the terms "annual percentage rate" and "finance charge" more conspicuously than other required terminology as required by Section 226.6(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth In Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder and violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid said draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Town Finance Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office at 557 Hope St., Bristol, R.I.

Respondent John Andrade is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Town Finance Corp., a corporation, its successors and assigns, and its officers, and John Andrade, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to use the term "cash price," as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the transaction, as required by Section 226.8(c)(1) of Regulation Z.

2. Failing to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8 (c) (2) of Regulation Z.

3. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c) (3) of Regulation Z.

4. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

5. Failing to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

6. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8 (c)(8)(ii) of Regulation Z.

7. Failing to print the terms "annual percentage rate" and "finance charge" more conspicuously than other required terminology, as required by Section 226.6(a) of Regulation Z.

8. Failing in any consumer credit transaction or advertisement to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents now or hereafter engaged in the consummation of any extension of consumer credit or in any aspect of the preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

VALLEY PREMIUM PLAN, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2629. Complaint, Jan. 27, 1975 - Decision, Jan. 27, 1975

Consent order requiring a Pawtucket, R.I., moneylender in connection with financing insurance premiums, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Lois M. Woocher.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Valley Premium Plan, a partnership, and William Fellner, George I. Parker, Edward L. Foster, William Hunt, R. Spencer Kyle, Abraham Snyder, George Stevens, John T. Wilmot and Alfred E. Hutchinson, individually and as partners in said partnership, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Valley Premium Plan is a partnership organized, existing, and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations having its principal office and place of business located at 100 East Ave., Pawtucket, R.I.

Respondents William Fellner, George I. Parker, Edward L. Foster, William Hunt, R. Spencer Kyle, Abraham Snyder, George Stevens, John T. Wilmot and Alfred E. Hutchinson, are individuals and are partners in the partnership respondent. They formulate, direct and control the policies, acts and practices of the partnership respondent including the acts and practices hereinafter set forth. Their address is the same as that of partnership respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the business of lending money to the public in connection with the financing of insurance premiums.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend and for some time last past have regularly extended consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of their business as aforesaid, have caused and are causing to be extended consumer credit as "consumer credit" is defined in Regulation Z, and have caused and are causing customers to execute a binding combination promissory note and disclosure statement, hereinafter referred to as the "statement." Respondents do not provide these customers with any other consumer credit cost disclosures.

By and through the use of the statement, respondents:

1. Failed in some instances to disclose the annual percentage rate accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Failed in some instances to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment as required by Section 226.8(c)(3) of Regulation Z.

3. Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, describing that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

4. Failed to make consumer credit cost disclosures when any existing extension of credit is refinanced, or two or more existing extensions of credit are consolidated, or an existing obligation is increased, as prescribed by Section 226.8(j) of Regulation Z.

5. Failed to furnish the consumer with a duplicate of the instrument containing the required disclosures or a statement by which the required disclosures are made, as required by Section 226.8(a) of Regulation Z.

6. Provided additional information which misleads or confuses the customer or observer or detracts attention from the information required to be disclosed by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

7. Failed to make the disclosures required by Section 226.8 of

Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder and violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Valley Premium Plan is a partnership organized, existing, and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations with its principal office and place of business located at 100 East Ave., Pawtucket, R.I.

Respondents William Fellner, George I. Parker, Edward L. Foster, William Hunt, R. Spencer Kyle, Abraham Snyder, George Stevens, John T. Wilmot and Alfred E. Hutchinson are individuals and are partners in said partnership. They formulate, direct and control the policies, acts and practices of said partnership and their principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Valley Premium Plan, a partnership, and William Fellner, George I. Parker, Edward L. Foster, William Hunt, R. Spencer Kyle, Abraham Snyder, George Stevens, John T. Wilmot and Alfred E. Hutchinson, individually and as copartners trading and doing business as Valley Premium Plan, or under any other name or names, their successors and assigns, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing to disclose the annual percentage rate accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z as required by Section 226.8 (b)(2) of Regulation Z.

2. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment as required by Section 226.8(c)(3) of Regulation Z.

3. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, describing that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

4. Failing to make consumer credit cost disclosures when any existing extension of credit is refinanced, or two or more existing extensions of credit are consolidated, or an existing obligation is increased, as prescribed by Section 226.8(j) of Regulation Z.

5. Failing to furnish the consumer with a duplicate of the instrument containing the required disclosures or a statement by which the required disclosures are made, as required by Section 226.8(a) of Regulation Z.

6. Stating, utilizing or placing any additional information in conjunction with the disclosures required by Regulation Z to be made, which information misleads or detracts attention from the information required by Regulation Z to be disclosed.

7. Failing to make all disclosures required by Regulation Z clearly, conspicuously, and in meaningful sequence, as required by Section 226.6(a) of Regulation Z.

8. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Section 226.4 and Section 226.5 of Regulation Z, at the time and in the manner, form and amount required by Sections 226.6, 226.8, and 226.10 of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit, or in any aspect of the preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the partnership respondent, such as dissolution, assignment, or sale, resulting in the emergence of a successor partnership, or any other change in the partnership which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

BELLEVUE LOAN COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2630. Complaint, Jan. 27, 1975 - Decision, Jan. 27, 1975

Consent order requiring a Newport, R.I., moneylender in connection with financing insurance premiums, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *William P. McDonough.*

For the respondents: *Moore, Virgigadamo, Boyle & Lynch,* Newport, R.I.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Bellevue Loan Company, a corporation, and Frank Heffernan, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bellevue Loan Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 39 Bellevue Ave., Newport, R.I.

Respondent Frank Heffernan is an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporation, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the business of lending money to the public in connection with the financing of insurance premiums.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend, and for some time last past have regularly extended consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents in the ordinary course of business as aforesaid, have caused and are causing to be extended consumer credit as "consumer credit" is defined in Regulation Z, and have caused and are causing customers to execute a premium finance agreement, hereinafter referred to as the "agreement." Respondents do not provide these customers with any other consumer credit cost disclosures.

By and through the use of the agreement, respondents:

1. Failed in some instances to disclose the annual percentage rate accurately to the nearest quarter of one percent, computed in accordance with the provisions of Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.
2. Failed to use the term "cash price," as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the transaction, as required by Section 226.8(c)(1) of Regulation Z.
3. Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.
4. Failed to use the term "finance charge" to describe the sum of all charges as required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.
5. Failed to print the term "finance charge" more conspicuously than other required terminology, as required by Section 226.6(a) of Regulation Z.
6. Failed to make the disclosures required by Section 226.8 of Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder and violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Bellevue Loan Company is a corporation organized, existing and doing business under and by virtue of the laws of the state of Rhode Island and Providence Plantations with its principal office and place of business located at 39 Bellevue Ave., Newport, R.I.

Respondent Frank Heffernan is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Bellevue Loan Company, a corporation, its successors and assigns, and its officers, and Frank Heffernan, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §601, *et seq.*) do forthwith cease and desist from:

1. Failing to disclose the annual percentage rate accurately to the nearest quarter of one percent, computed in accordance with the provisions of Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Failing to use the term "cash price," as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the transaction, as required by Section 226.8(c)(1) of Regulation Z.

3. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

4. Failing to use the term "finance charge" to describe the sum of

all charges required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.

5. Failing to print the term "finance charge" more conspicuously than other required terminology, as required by Section 226.6(a) of Regulation Z.

6. Failing to make all disclosures required by Section 226.8 of Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

7. Failing in any consumer credit transaction or advertisement to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents now or hereafter engaged in the consummation of any extension of consumer credit or in any aspect of the preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

THEODORE STEPHEN COMPANY, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, TEXTILE FIBER PRODUCTS IDENTIFICATION AND TRUTH IN LENDING ACTS

Docket 8944. Complaint, Dec. 7, 1973 - Decision, Jan. 28, 1975

Order requiring a Silver Spring, Md., carpet retailer, among other things to cease using bait and switch tactics; failing to maintain adequate records; misrepresenting savings available to consumers; misrepresenting prices or terms and conditions thereof; misrepresenting guarantees; misrepresenting credit services or terms; failing to notify consumers of their right to cancel contracts within three business days; misbranding and falsely advertising its textile fiber products; and failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the Truth in Lending Act.

Appearances

For the Commission: *Everette E. Thomas, Richard F. Kelly* and *Michael Dershowitz.*

For the respondents: *John H. Harmon, Coggins, Fireison & Harmon,* Silver Spring, Md.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Theodore Stephen Company, Inc., a corporation, and Benjamin Eisenman, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, the implementing regulation, and the rules and regulations promulgated under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Theodore Stephen Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 14405 Sturtevant Rd., Silver Spring, Md.

Respondent Benjamin Eisenman is an individual and is the principal officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their places of business located in the State of Maryland, to purchasers thereof located in various other States of the United States and the District of Columbia, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor coverings, respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of their salesmen to prospective purchasers with respect to their products and services.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

CARPET SALE
ALL THE CARPET
YOU NEED
FOR 6 AREAS
$125
*LIVING ROOM *BEDROOM
*DINING ROOM
*STEPS *HALL
*FOYER

* * * * * * *

POLYESTER SHAG $5.99 SQ. YD.

100% ACRILAN $6.99 SQ. YD.

* * * * * * *

ANNIVERSARY CARPET SALE
TOTAL PRICES $125
ANY 3 AREAS
COMPLETELY INSTALLED
CARPETING, PADDING, LABOR
UP TO 320 Sq. Ft.

* * * * * * *

IMMEDIATE INSTALLATION
CARPET AND LABOR GUARANTEED
LOWEST PRICES
Because we don't give gifts

* * * * * * *

BANK RATE TERMS TO FIT
YOUR BUDGET

* * * * * * *

LOW BANK RATE TERMS

* * * * * * *

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing, directly or by implication, that:

1. Respondents are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements.

2. By and through the use of the word "SALE," and other words of similar import and meaning not set out specifically herein, that said carpeting and floor coverings may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regularly selling prices.

3. By and through the use of the words "COMPLETELY INSTALLED, CARPETING, PADDING, LABOR" and other words of similar import and meaning, not set out specifically herein, that all of

the carpeting mentioned in such advertisements is installed with separate padding included at the advertised price.

4. Certain of respondents' products are unconditionally guaranteed.

5. By and through the use of the words "BANK RATE TERMS TO FIT YOUR BUDGET," "LOW BANK RATE TERMS" and words of similar import and meaning, not set out specifically herein, that respondents extend credit to their customers at or below rates which are usually charged by banks.

PAR. 6. In truth and in fact:

1. Respondents' offers are not bona fide offers to sell said carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of carpeting. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents or their salesmen, who make little or no effort to sell to the prospective customer the advertised carpeting. Instead, they exhibit what they represent to be the advertised carpeting which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced carpeting or floor coverings of superior quality and texture are thereupon exhibited, which by comparison disparages and demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents, through their salesmen, attempt to sell and frequently do sell the higher priced carpeting.

2. Respondents' products are not being offered for sale at special or reduced prices. To the contrary, the price respondents regularly advertise and their so-called advertised "sale" price are identical and are used to mislead prospective customers into believing there is a saving from a bona fide regular selling price. In fact, seldom, if ever, are the advertised items sold, because the offer is designed to act as the inducement for the practices set forth in Paragraph Six, 1., hereof.

3. A substantial portion of the carpeting advertised by the respondents is not installed with separate padding which is included in the advertised price. To the contrary, a substantial portion of the advertised carpeting has rubberized backing which is bonded to the carpeting.

4. Respondents' carpeting and floor coverings are not unconditionally guaranteed. To the contrary, such guarantees as are available are subject to numerous substantial conditions and limitations.

5. Respondents arrange credit for customers through finance companies or other third parties at rates substantially higher than those generally charged by banks.

Therefore, the statements and representations as set forth in Paragraphs Four and Five, hereof, were and are false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents and their salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Six, above, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

PAR. 8. In the further course and conduct of their aforesaid business, and in connection with the representations set forth in Paragraph Four above, respondents offer carpet with padding and installation included at a price based upon specified areas of coverage. In making such offer, respondents have failed to disclose the material fact that the prices stated for such specified areas of coverage are not applied at the same rate for additional quantities of carpet needed, but are priced substantially higher.

The aforesaid failure of the respondents to disclose said material facts to purchasers has the tendency and capacity to lead and induce a substantial number of such persons into the understanding and belief that the prices charged for quantities of carpet needed in excess of the specified areas of coverage will not be substantially higher than the rate indicated by the initial offer.

Therefore, respondents' failure to disclose such material facts was, and is, unfair, false, misleading and deceptive.

PAR. 9. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents use the term "up to 320 sq. ft." to indicate the quantity of carpeting available at the advertised price.

PAR. 10. The unit of measurement usually and customarily employed in the retail advertising of carpet is square yards. Consumers are accustomed to comparing the price of carpet in terms of price per square yard, therefore respondents' use of the square foot unit of measurement confuses consumers who compare respondents' prices with competitors' prices advertised on a square yard basis.

Furthermore, respondents use of square foot measurements exaggerates the size or quantity of carpeting being offered, and therefore has the capacity and tendency to mislead consumers into the mistaken belief they are being offered a greater quantity of carpet than is the fact.

Therefore, the acts and practices as set forth in Paragraph Nine hereof were and are unfair, false, misleading and deceptive.

PAR. 11. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and service of the same general kind and nature as those sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Textile Fiber Products Identification Act and the implementing rules and regulations promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 14. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products including carpeting and floor covering and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 15. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and of the rules and regulations promulgated thereunder, in that they were falsely and deceptively advertised, or otherwise identified as to the name and amount of constituent fibers contained therein.

PAR. 16. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and to assist, directly or indirectly, in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the rules and regulations promulgated under said Act.

PAR. 17. Among such textile fiber products, but not limited thereto, was carpeting which was falsely and deceptively advertised in *The Washington Post* newspaper published in the District of Columbia, and having a wide circulation in the District of Columbia and various other States of the United States, in that said carpeting was described by such fiber connoting terms among which, but not limited thereto, was "Acrilan," and the true generic name of the fiber contained in such carpeting was not set forth.

PAR. 18. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder in the following respects:

1. In disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding, in violation of Rule 11 of the aforesaid rules and regulations.

2. A fiber trademark was used in advertising textile fiber products, without a full disclosure of the fiber content information required by said act, and the regulations promulgated thereunder, in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid rules and regulations.

3. A fiber trademark was used in advertising textile fiber products, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of Rule 41(c) of the aforesaid rules and regulations.

PAR. 19. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, and unfair methods of competition, in commerce, under the Federal Trade Commission Act.

COUNT III

Alleging violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 20. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 21. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, have caused, and are causing customers to execute binding retail installment contracts, hereinafter referred to as the "contract."

PAR. 22. By and through the use of the contract respondents, in a number of instances:

(1) Failed to include in the finance charge the amount of the charges or premiums for credit life insurance in instances where customers desiring such insurance coverage did not give specific dated and separately signed affirmative written indication of such desire, as provided in Section 226.4(a)(5)(ii) of Regulation Z.

(2) By reason of failing to include in the finance charge the amount of the charges or premiums for credit life insurance, as stated in (1) above, failed to disclose accurately the "amount financed," and "finance charge," as required by Sections 226.8(c)(7), and 226.8(c)(8)(i), respectively, of Regulation Z, and the "annual percentage rate" accurately to the nearest quarter of one percent, computed in accordance with the provisions of Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

(3) Failed to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, computed in accordance with the provisions of Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

(4) Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

PAR. 23. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY RAYMOND J. LYNCH, ADMINISTRATIVE LAW JUDGE

JULY 31, 1974

PRELIMINARY STATEMENT

On Dec. 18, 1973, the Federal Trade Commission issued a complaint in this proceeding alleging that the respondents Theodore Stephen Company, Inc., a corporation, and Benjamin Eisenman, individually and as an officer of said corporation, violated the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, the Truth in Lending Act and the implementing regulations promulgated thereunder.

Respondents filed an answer to the complaint on Jan. 16, 1974, and a prehearing conference was held in the matter on Jan. 29, 1974. An amended answer to the complaint was filed on Feb. 26, 1974 admitting all of the allegations of the complaint. A prehearing conference was held on Feb. 27, 1974. Respondents filed a brief in support of their amended answer on Mar. 28, 1974, and complaint counsel filed a memorandum in support of their position on Mar. 29, 1974. Oral argument was held on Apr. 17, 1974. The respondents having admitted all of the allegations of the complaint, the only remaining matter to be determined is the nature of the sanction to be imposed.

FINDINGS OF FACT

1. Respondent Theodore Stephen Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws

of the State of Maryland, with its principal office and place of business located at 14405 Sturtevant Rd., Silver Spring, Md.

Respondent Benjamin Eisenman is an individual and is the principal officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their places of business located in the State of Maryland, to purchasers thereof located in various other States of the United States and the District of Columbia, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor coverings, respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of their salesmen to prospective purchasers with respect to their products and services.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

CARPET SALE
ALL THE CARPET
YOU NEED
FOR 6 AREAS
$125
*LIVING ROOM *BEDROOM
*DINING ROOM
*STEPS *HALL
*FOYER

* * * * * * *

POLYESTER SHAG $5.99 SQ. YD.

100% ACRILAN $6.99 SQ. YD.

* * * * * * *

ANNIVERSARY CARPET SALE

TOTAL PRICES $125
ANY 3 AREAS
COMPLETELY INSTALLED
CARPETING, PADDING, LABOR
UP TO 320 Sq. Ft.

* * * * * * *

IMMEDIATE INSTALLATION
CARPET AND LABOR GUARANTEED
LOWEST PRICES
Because we don't give gifts

* * * * * * *

BANK RATE TERMS TO FIT
YOUR BUDGET

* * * * * * *

LOW BANK RATE TERMS

5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing, directly or by implication, that:

a. Respondents are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements.

b. By and through the use of the word "SALE", and other words of similar import and meaning not set out specifically herein, that said carpeting and floor coverings may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regularly selling prices.

c. By and through the use of the words "COMPLETELY INSTALLED, CARPETING, PADDING, LABOR" and other words of similar import and meaning, not set out specifically herein, that all of the carpeting mentioned in such advertisements is installed with separate padding included at the advertised price.

d. Certain of respondents' products are unconditionally guaranteed.

e. By and through the use of the words "BANK RATE TERMS TO FIT YOUR BUDGET," "LOW BANK RATE TERMS" and words of similar import and meaning, not set out specifically herein, that respondents extend credit to their customers at or below rates which are usually charged by banks.

6. In truth and in fact:

a. Respondents' offers are not bona fide offers to sell said carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of carpeting. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents or their salesmen, who make little or no effort to sell to the prospective customer the advertised carpeting. Instead, they exhibit what they represent to be the advertised carpeting, which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced carpeting or floor coverings of superior quality and texture are thereupon exhibited, which by comparison disparages and demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents, through their salesmen, attempt to sell and frequently do sell the higher priced carpeting.

b. Respondents' products are not being offered for sale at special or reduced prices. To the contrary, the price respondents regularly advertise and their so-called advertised "sale" price are identical and are used to mislead prospective customers into believing there is a saving from a bona fide regular selling price. In fact, seldom, if ever, are the advertised items sold, because the offer is designed to act as the inducement for the practices set forth in Finding 6 a, hereof.

c. A substantial portion of the carpeting advertised by the respondents is not installed with separate padding which is included in the advertised price. To the contrary, a substantial portion of the advertised carpeting has rubberized backing which is bonded to the carpeting.

d. Respondents' carpeting and floor coverings are not unconditionally guaranteed. To the contrary, such guarantees as are available are subject to numerous substantial conditions and limitations.

e. Respondents arrange credit for customers through finance companies or other third parties at rates substantially higher than those generally charged by banks.

Therefore, the statements and representations as set forth in Findings 4 and 5, hereof, were and are false, misleading and deceptive.

7. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents and their salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Findings 4 through 6, above, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

8. In the further course and conduct of their aforesaid business, and in connection with the representations set forth in Finding 4 above, respondents offer carpet with padding and installation included at a price based upon specified areas of coverage. In making such offer, respondents have failed to disclose the material fact that the prices stated for such specified areas of coverage are not applied at the same rate for additional quantities of carpet needed, but are priced substantially higher.

The aforesaid failure of the respondents to disclose said material facts to purchasers has the tendency and capacity to lead and induce a substantial number of such persons into the understanding and belief that the prices charged for quantities of carpet needed in excess of the specified areas of coverage will not be substantially higher than the rate indicated by the initial offer.

Therefore, respondents' failure to disclose such material facts was, and is, unfair, false, misleading and deceptive.

9. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents use the term "up to 320 sq. ft." to indicate the quantity of carpeting available at the advertised price.

10. The unit of measurement usually and customarily employed in the retail advertising of carpet is square yards. Consumers are accustomed to comparing the price of carpet in terms of price per square yard, therefore respondents' use of the square foot unit of measurement confuses consumers who compare respondents' prices with competitors' prices advertised on a square yard basis.

Furthermore, respondents' use of square foot measurements exaggerates the size or quantity of carpeting being offered, and therefore has the capacity and tendency to mislead consumers into the mistaken belief they are being offered a greater quantity of carpet than is the fact.

Therefore, the acts and practices as set forth in Findings 9 and 10 hereof were and are unfair, false, misleading and deceptive.

11. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and service of the same general kind and nature as those sold by respondents.

12. The use by respondents of the aforesaid false, misleading and

deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

13. The aforesaid acts and practices of respondents, as set forth in Findings 11 and 12, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

14. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products including carpeting and floor covering and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

15. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and of the rules and regulations promulgated thereunder, in that they were falsely and deceptively advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

16. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and to assist, directly or indirectly, in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the rules and regulations promulgated under said Act.

17. Among such textile fiber products, but not limited thereto, was carpeting which was falsely and deceptively advertised in *The*

Washington Post newspaper published in the District of Columbia, and having a wide circulation in the District of Columbia and various other states of the United States, in that said carpeting was described by such fiber connoting terms among which, but not limited thereto, was "Acrilan," and the true generic name of the fiber contained in such carpeting was not set forth.

18. By means of the aforesaid advertisements and others of similar import and meaning not specifically found herein, respondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder in the following respects:

a. In disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding, in violation of Rule 11 of the aforesaid rules and regulations.

b. A fiber trademark was used in advertising textile fiber products, without a full disclosure of the fiber content information required by said Act, and the regulations promulgated thereunder, in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid rules and regulations.

c. A fiber trademark was used in advertising textile fiber products, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of Rule 41(c) of the aforesaid rules and regulations.

19. The acts and practices of respondents as found above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, and unfair methods of competition, in commerce, under the Federal Trade Commission Act.

20. In the ordinary course and conduct of their business, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

21. Subsequent to July 1, 1969, respondents, in the ordinary course of business, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, have caused, and are causing customers to

execute binding retail installment contracts, hereinafter referred to as the "contract."

22. By and through the use of the contract respondents, in a number of instances:

(1) Failed to include in the finance charge the amount of the charges or premiums for credit life insurance in instances where customers desiring such insurance coverage did not give specific dated and separately signed affirmative written indication of such desire, as provided in Section 226.4(a)(5)(ii) of Regulation Z.

(2) By reason of failing to include in the finance charge the amount of the charges or premiums for credit life insurance, as stated in (1) above, failed to disclose accurately the "amount financed," and "finance charge," as required by Sections 226.8(c)(7) and 226.8(c)(8)(i), respectively, of Regulation Z, and the "annual percentage rate" accurately to the nearest quarter of one percent, computed in accordance with the provisions of Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

(3) Failed to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, computed in accordance with the provisions of Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

(4) Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

23. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of and over respondents and the subject matter of this proceeding.

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. Respondents have engaged in unfair methods of competition in commerce and have committed unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

4. Respondents have violated the provisions of the Textile Fiber

Products Identification Act, the Truth in Lending Act and the implementing regulations promulgated thereunder.

THE REMEDY

As previously stated herein, the parties filed briefs and oral argument was held regarding the nature of the sanction to be imposed. It is the contention of counsel supporting the complaint that in order to protect the public interest corrective advertising such as that set forth in the complaint must be issued:

> The Federal Trade Commission ha[s] found that we engage in bait and switch advertising; that is, the salesman makes it difficult to buy the advertised product and he attempts to switch you to a higher priced item.

The respondents, on the other hand, contend that Section 5 of the Federal Trade Commission Act in no way gives the Commission the power to issue an order requiring "the respondents [to] devote a certain portion of their future advertising to a confession and admission that they have been found by the Federal Trade Commission to have engaged in 'Bait and Switch' tactics." The respondents argue that the recommended remedy is penal in nature, unconstitutional and the taking of property without just compensation. Furthermore, that should the order issue, the net effect would be that the respondents would be put out of business.

The Commission is vested with broad discretion in determining the type of order necessary to ensure discontinuance of the unlawful practices found. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613 (1946); *Niresk Industries, Inc.*, v. *Federal Trade Commission*, 278 F.2d 337 (7th Cir. 1960), *cert. denied* 364 U.S. 883. It is well settled that the Commission may require affirmative statements in advertising where failure to make such statements leaves the prospective consumer without all the material facts on which to base his choice as to whether to do business with the advertiser or purchase the product advertised. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

The position of the Commission with respect to corrective advertising has been set forth very clearly in *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 471, where the Commission held that:

> [A]n order requiring corrective advertising is well within the arsenal of relief provisions which the Commission may draw upon in fashioning effective remedial measures to bring about a termination of the acts or practices found to have been unfair or deceptive. If such relief is warranted to prevent continuing injury to the public, it is neither punitive nor retrospective.

* * * * * * *

> [C]orrective advertising orders where necessary and appropriate will violate neither the letter nor the spirit of the First Amendment guarantees of free speech and press and are clearly within the remedial authority of the Commission.

Subsequently, the Commission had occasion to reiterate the theories in *ITT Continental Baking Co. Inc.*, F.T.C. Docket 8860, [83 F.T.C. 865], wherein it stated:

> We have further evidence that many months after conclusion of the advertising campaign a small percentage of consumers recall the nutritional advertising of respondents though it is not clear from this evidence to what extent those consumers continued to believe that Wonder Bread is an extraordinary food (the misrepresentation found to have been made) * * * we cannot find in the record a sufficient basis upon which to conclude that corrective advertising is needed to eliminate the misrepresentation found.

In addition, the Commission has also set forth its position with respect to the imposition of sanctions in both the *Curtis Publishing Company* case, Docket No. 8800 [78 F.T.C. 1472], and the *Universal Credit Acceptance Company* case, Docket No. 8821 [82 F.T.C. 570], wherein they very emphatically decided that even in a case of what was deemed restitution they had the power to, and indeed did in *Universal Credit, supra*, impose an order which was referred to throughout as restitutionary relief.

Taking into consideration all of the cases that have come before, and the Commission's repeatedly stated position, the undersigned is of the opinion that he is bound by the precedent that has already been established by the Commission.

Therefore, the undersigned concludes that as a result of the respondents' activities, the request of counsel supporting the complaint for corrective advertising is not beyond the scope of the Commission's power, and that in order to stop the respondents and deter others from engaging in acts and practices as set forth herein, the corrective advertising provision of the Commission's order should be imposed.

ORDER

I

It is ordered, That respondents Theodore Stephen Company, Inc., a corporation, its successors and assigns, and its officers, and Benjamin Eisenman, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of carpeting and floor coverings, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of carpeting or other merchandise or services.

2. Making representations, orally or in writing, directly or by implication, purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.

3. Disparaging in any manner, or discouraging the purchase of any merchandise or services which are advertised or offered for sale.

4. Representing, orally or in writing, directly or by implication, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price; and

c. a computation of the net profit from the sales of each advertised product or service at the advertised price.

6. Using the word "Sale," or any other word or words of similar import or meaning not set forth specifically herein unless the price of such merchandise being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business.

7. (a) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such merchandise has been sold or offered for sale in good faith at the former price by respondents for a reasonably substantial period of time in the recent, regular course of their business.

(b) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise at the compared price or some higher price.

(c) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise, unless substantial sales or merchandise of like grade and quality are being made in the trade area at the compared price or a higher price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in their trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise of like grade and quality.

8. Failing to maintain and produce for inspection or copying for a period of three (3) years, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations as set forth in Paragraphs Six and Seven of this order are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

9. Representing, orally or in writing, directly or by implication, that a stated price for carpeting or floor coverings includes the cost of a separate padding and the installation of such padding and carpeting thereof, unless in every instance where it is so represented the stated price for floor covering does, in fact, include the cost of such separate padding and installation thereof; or misrepresenting in any manner, the prices, terms, or conditions under which respondents supply separate padding and provide installation in connection with the sale of floor covering products.

10. Representing, orally or in writing, directly or by implication, that any product or service is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and respondents deliver to each purchaser, prior to the signing of the sales contract, a written guarantee clearly setting forth all of the terms, conditions and limitations of the guarantee fully equal to the representations, orally or in writing, directly or by implication, made to each such purchaser, and unless respondents promptly and fully perform all of their obligations and requirements under the terms of each such guarantee.

11. Representing, orally or in writing, directly or by implication,

that respondents extend credit to customers or extend credit at bank rates; or misrepresenting in any manner, credit services or credit terms.

12. Contracting for any sale whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

13. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

14. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned, "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

[enter date of transaction]

____

(date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE

SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [*Name of seller*], AT [*address of seller's place of business*], NOT LATER THAN MIDNIGHT OF (*date*).

I HEREBY CANCEL THIS TRANSACTION.

____
(Date)

____
(Buyer's signature)

15. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

16. Including in any sales contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

17. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

18. Misrepresenting, directly or indirectly, orally or in writing, the buyer's right to cancel.

19. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

20. Negotiating, transferring, selling, or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

21. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

22. Advertising the price of carpet, either separately or with padding and installation included, for specified areas of coverage

without disclosing in immediate conjunction and with equal prominence the square yard price for additional quantities of such carpet with padding and installation needed.

23. Advertising any carpeting or floor covering using a unit of measurement not usually and customarily employed in the retail advertising of carpet or which tends to exaggerate the size or quantity of carpeting or floor covering being offered at the advertised price.

Provided, however, That nothing contained in Part I of this order shall relieve respondents of any additional obligations respecting contracts required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent, respondents can apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon showing, shall make such modifications as may be warranted in the premises.

II

It is further ordered, That respondents Theodore Stephen Company, Inc., a corporation, its successors and assigns, and its officers, and Benjamin Eisenman, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

B. Falsely and deceptively advertising textile products by:

1. Making any representations by disclosure or by implication, as to fiber content of any textile fiber product in any written advertisement which is used to aid, promote or assist, directly or indirectly, in the sale, or offering for sale, of such textile fiber product unless the same

information required to be shown on the stamp, tag, label or other means of identification under Sections 4(b)(1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Failing to set forth in advertising the fiber content of floor covering containing exempted backings, fillings or paddings, that such disclosure related only to the face, pile or outer surface of such textile fiber products and not to the exempted backings, fillings or paddings.

3. Using a fiber trademark in advertising textile fiber products without a full disclosure of the required fiber content information in at least one instance in said advertisement.

4. Using a fiber trademark in advertising textile fiber products containing only one fiber without such fiber trademark appearing at least once in the advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type.

III

It is further ordered, That respondents Theodore Stephen Company, Inc., a corporation, its successors and assigns, and its officers, and Benjamin Eisenman, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

(1) Failing to include in the finance charge the amount of the charges or premiums for credit life insurance in instances where customers desiring such insurance coverage did not give specific dated and separately signed affirmative written indications of such desire, as provided in Section 226.4(a)(5)(ii) of Regulation Z.

(2) Failing to disclose accurately the "amount financed," and "finance charge," as required by Sections 226.8(b)(7), and 226.8(c)(8)(i), respectively, of Regulation Z.

(3) Failing to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, computed in accordance with the provisions of Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

(4) Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance

charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

(5) Failing in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That each of respondents do forthwith cease and desist from disseminating or causing the dissemination of, any advertisement of merchandise by means of newspapers, or other printed media, television or radio, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, unless respondents clearly and conspicuously disclose in each advertisement the following notice set off from the text of the advertisement by a black border:

> The Federal Trade Commission has found that we engage in bait and switch advertising; that is, the salesman makes it difficult to buy the advertised product and he attempts to switch you to a higher priced item.

One year from the date this order becomes final or any time thereafter, respondents upon showing that they have discontinued the practices prohibited by this order and that the notice provision is no longer necessary to prevent the continuance of such practices may petition the Commission to waive compliance with this order provision.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor covering and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of carpeting or floor coverings and other merchandise, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale, sale of any product, consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the said respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

OPINION OF THE COMMISSION

BY HANFORD, *Commissioner*

Respondents appeal from that part of the order entered by the administrative law judge constituting a "consumer warning" requirement, which provides that respondents must include the following disclosure in all of their advertisements:

> The Federal Trade Commission has found that we engage in bait and switch advertising; that is, the salesman makes it difficult to buy the advertised product and he attempts to switch you to a higher priced item.

On two occasions, we have faced the question of whether such a warning is justified in a contested carpet bait and switch case: *Wilbanks Carpet Specialists, Inc., et al.*, Docket 8933 (Sept. 24, 1974) [84 F.T.C. 670], and *Tri-State Carpets, Inc., et al.*, Docket 8945 (Oct. 15, 1974) [84 F.T.C. 1078]. In each instance, we determined that the record did not support such a requirement. We find nothing in the record of this case to distinguish it from *Wilbanks* and *Tri-State.* Therefore we find it necessary to delete Judge Lynch's "consumer warning" from the order. This determination is, of course, without prejudice to the Commission's right to reopen this proceeding to consider the imposition of a "consumer warning" requirement, or to seek imposition of such relief in a civil penalty action against respondents,[1] should their future conduct warrant either course of action.

In all other respects, the order of the administrative law judge is affirmed.

FINAL ORDER

This matter has come before the Commission on the motion of respondents, for consideration of the question whether the consumer warning provision ordered by the administrative law judge should be adopted as part of the Commission's cease and desist order. The Commission has determined that this matter is indistinguishable from the matter of *Wilbanks Carpet Specialists, Inc., et al.*, Docket 8933 [84 F.T.C. 670] and *Tri-State Carpets, Inc., et al.*, Docket 8945 [84 F.T.C. 1078], inasmuch as the record presents insufficient evidence that a consumer warning is a necessary or appropriate means for the termination of the act or practices complained of or for the prevention of their recurrence. Having declined to order a consumer warning in the *Wilbanks* and *Tri-State* matters, the Commission has concluded that the same disposition is warranted herein.

Accordingly, the initial decision issued by the judge should be modified in accordance with the foregoing views of the Commission, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision issued by the administrative law judge be modified by striking therefrom the following:

Those portions of the conclusions of law which concern "consumer warning" relief (at pp. 11-13 [pp. 168-169 herein] *sub nom. "THE REMEDY"*); and the second "FURTHER ORDERED" paragraph of Part III of the order to cease and desist issued by the judge (at pp. 29-30)[p. 176 herein].

As so modified, the initial decision is hereby adopted.

IN THE MATTER OF

AAMCO AUTOMATIC TRANSMISSIONS, INC.

MODIFYING ORDER, IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2305. Decision, Oct. 18, 1972 - Modifying Order, Feb. 3, 1975

Ordering modifying a consent order issued against respondent, 81 F.T.C. 618, 37 F.R.

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[1] Section 5(l) of the Federal Trade Commission Act (15 U.S.C. §45(l)) empowers district courts hearing civil penalty actions "to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of * * * final orders of the Commission."

24737, corrections 25704, by deleting Paragraphs III and IV of the original order which permitted respondent to formulate and establish standards for a quality control program, "secondary level of inspection," whereby transmission parts are tested and inspected by vendors prior to sale; permitted respondent to maintain an approved vendors list which contains the names of vendors who actually perform a "secondary level of inspection"; and restricted franchisees to purchase only from AAMCO or vendors whose names appear on the approved vendors list. The respondent is required by the modified order to effect modification of the provisions of every contract between it and its franchisees contrary to or inconsistent with the modified order.

Appearances

For the Commission: *J. Thomas Rosch.*

For the respondent: *Martin Howard Katz*, Bridgeport, Pa., *Daniel J. McCauley, Jr., Blank, Rome, Klaus & Comisky*, Philadelphia, Pa.

ORDER REOPENING PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

The Commission, on Oct. 30, 1974, having issued an order against respondent to show cause why the proceedings herein should not be reopened for the purpose of modifying the consent order to cease and desist entered on Oct. 18, 1972 [81 F.T.C. 618]; and

Respondent having answered that it has no objection to the reopening of the proceeding and the modification of the consent order, as set forth in the order to show cause.

Accordingly, *It is ordered*, That the matter be reopened, and that the order herein be modified so that it will read:

I

It is ordered, That respondent, AAMCO Automatic Transmissions, Inc. (AAMCO), a corporation, its successors, assigns, officers, directors, agents, representatives and employees, directly or through any corporate or other device, in connection with the franchising or licensing of persons to operate an automotive transmission repair franchise business, such franchising and operation constituting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from requiring, in any manner or by any means, directly or indirectly, its franchisees to purchase the automotive parts, new or rebuilt, equipment and merchandise used by such franchisees in the establishment and operation of their automotive repair business from AAMCO or from any other source;

Provided, That nothing in this order shall prohibit AAMCO from establishing, maintaining and implementing, from time to time, reasonable manufacturing specifications for transmission parts, equipment or merchandise to be used by its franchisees in their business, and reasonable standards for transmission services, repairs, and rebuilding offered by its franchisees. Such specifications and standards shall be made available without charge to sources of supply of such items to AAMCO's franchisees.

II

It is further ordered, That respondent take all necessary action to effect the modification of each provision of every contract between it and its franchisees which is contrary to or inconsistent with this order.

III

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IV

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order.

IN THE MATTER OF

KASSLER & CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2631. Complaint, Feb. 3, 1975 - Decision, Feb. 3, 1975

Consent order requiring a Denver, Colo., mortgage banker, among other things to cease distributing to real estate agents forms which restrict the buyer's source of home loan credit, which require the purchaser to sign at a later date a real estate contract form, the terms of which are not set forth or attached to the earnest money agreement, and which require a purchaser's title insurance policy or preliminary report only be delivered to the respondent. Other provisions of the order will enable the buyer to be informed of the conditions of the real estate contract into which he is entering.

Appearances

For the Commission: *Dennis D. McFeely.*

For the respondent: *Jones, Grey, Bayley & Olsen*, Seattle, Wash.

COMPLAINT

The Federal Trade Commission, having reason to believe that Kassler & Co., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Kassler & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 600 Grant St., Denver, Colo. Respondent operates thirty branch and district offices located primarily in the western United States, including four offices in western Washington. Respondent services trust deeds and mortgages totaling in excess of $882,000,000.

PAR. 2. Respondent is and has been engaged in the business of brokering, granting, and servicing loans secured by mortgages and trust deeds on residential real estate, and performing escrow and closing services in connection with the purchase of residential real estate.

PAR. 3. In the course and conduct of said business, respondent sends substantial quantities of documents, records, and messages between its branch offices and regional headquarters located in Washington State and its head office in Denver, and also between the branch offices and regional headquarters located in Washington State and the office of the head of residential home mortgage production in Encino, Calif. Respondent also regularly transfers funds between Washington State and its Colorado headquarters. A significant portion of the foregoing activities pertain specifically to the generation and promotion of respondent's business. Respondent is thereby maintaining and has maintained a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. For the purpose of promoting its business, respondent has distributed to real estate agents throughout many parts of western Washington a contract form generally known in that area as an "earnest money agreement" form. This form is utilized by real estate agents to create legally binding sale and purchase obligations between sellers and purchasers of residential real estate. The earnest money agreement form is written so that it can be utilized both for mortgage loan financing and for sales of property pursuant to a real estate contract.

PAR. 5. Said earnest money agreement form contains, among others, the following provisions:

> 1. If financing is required, the purchaser and seller hereby authorize Agent herein to select the lending institution and to arrange the financing of this sale and to advance so much of the earnest money as may be necessary for loan costs. Purchaser agrees to make application immediately for such financing upon request of Agent, sign necessary papers and deposit, before closing, said advances and all closing costs attributable to purchaser.
>
> 2. If this agreement is for sale on real estate contract, seller and purchaser agree to execute a Real Estate Contract for the balance of the purchase price on Real Estate Contract Form No. A-1964 of Pioneer National Title Insurance Company, Security Title Insurance Company or Transamerica Title Insurance Company. The terms of said forms are herein incorporated by reference and the terms of any one of said forms are satisfactory to the parties hereto and said parties agree to execute any one of said contract forms selected by the closing agent.
>
> 3. Seller shall make available to purchaser, at office of KASSLER & CO. MORTGAGE BANKERS, or its agent, after acceptance of this offer, a standard form purchaser's policy of title insurance or report preliminary thereto issued by a Title Insurance Company, and seller authorizes Agent to apply at once for such title insurance. . . . Delivery of such policy or title report to KASSLER & CO. MORTGAGE BANKERS, or its agent shall constitute delivery to purchaser.

PAR. 6. The aforesaid provisions are unfair to purchasers of residential real estate in that:

1. The provision set forth above in Paragraph Five, subparagraph 1, (a) permits the real estate agent to select the lender, thereby preventing the home purchaser from shopping among competing financial institutions for the most favorable credit terms and services, (b) permits the real estate agent to advance the purchaser's money to a lending institution for preliminary loan costs without further consent of the purchaser, thereby restricting the purchaser's freedom to seek financing elsewhere, (c) may lead purchasers to interpret recommendations and suggestions made by real estate agents concerning sources of residential loans as being obligatory upon the purchaser, (d) permits real estate agents to send business to lenders without regard to the best interests of the purchaser in order to receive gifts, monies or other things of value from such lenders, (e) permits real estate agents to send business to lenders which will forego or diminish discounts chargeable to the seller while charging the buyer a higher interest rate, higher loan fees, or other charges, and (f) creates an irreconcilable conflict between the fiduciary duties owed by the real estate agent to the seller and duties owed to the purchaser.

2. The provision set forth above in Paragraph Five, subparagraph 2, requires the purchaser to sign at a later time a real estate contract form, the terms of which are not set forth in the body of the earnest money agreement, nor included as an attachment thereto. Such

undisclosed terms of the real estate contract which is required to be signed include, among other provisions, the following: (a) forfeiture of the entire amount theretofore paid by the purchaser in the event of a default by the purchaser, (b) that the purchaser has made full inspection of the real estate and that the seller will not be held to any covenant as to condition, or agreement for alterations unless in writing, (c) assumption by the purchaser of all risks of damage to the property during the term of the real estate contract. Although the foregoing terms, and other terms of the real estate contract, are of substantial significance to the purchaser, the purchaser, in the absence of the real estate contract form, is not normally aware of such terms at the time of signing the earnest money agreement.

3. The provision set forth above in Paragraph Five, subparagraph 3, requires only that a purchaser's title insurance policy or preliminary report be delivered to the respondent. The prevailing practice in transactions where respondent's said earnest money agreement form has been utilized is to deliver a copy of the preliminary report only to the respondent or other lending institution used by the buyer and to send a copy of the final title insurance policy to the purchaser only after the transaction has been closed and the monies disbursed. Accordingly, (a) there is no requirement that the purchaser be provided with a copy of any preliminary title report or insurance policy, (b) the purchaser is generally not apprised before the closing of the real estate transaction of the extent of title insurance coverage, including the existence of conditions and exceptions to such coverage, (c) the purchaser may be deprived of the opportunity for timely renegotiation of the purchase price to compensate for title defects not apparently curable, (d) the purchaser may be deprived of the timely exercise of his or her contractual right not to purchase because of incurable title defects, and (e) the purchaser may be deprived of the opportunity to undertake to negotiate prior to closing for the removal of unwanted encumbrances which would not normally be removed through the closing process.

PAR. 7. Inasmuch as most purchasers of residential real estate do not have sufficient knowledge or capability to effectively bargain with the seller or his representatives to vary the printed terms and conditions set forth in respondent's earnest money agreement form, the provisions set out in Paragraph Five are almost invariably retained and included in the executed earnest money agreements which utilize respondent's forms. Additionally, subsequent to the execution of the form earnest money agreement, purchasers of residential real estate which utilize respondent's said form generally do not have the knowledge and capability to effectively ameliorate, renegotiate or otherwise diminish the effect of the terms stated in Paragraph Five.

PAR. 8. In the course and conduct of its business, and at all times mentioned herein, respondent has been and now is in substantial competition, in commerce, with corporations, firms and individuals engaged in the performance of services of the same general kind and nature as those provided by respondent.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair acts and practices in commerce and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Proposed respondent Kassler & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 600 Grant St., Denver, Colo.
2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Kassler & Co., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the promoting and granting of residential loans in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Disseminating or distributing, in any manner, directly or indirectly, any earnest money or other contract forms used in connection with the purchase and sale of real estate (all hereinafter referred to as "earnest money forms"):

a. which provide that the seller or purchaser authorizes the real estate agent to select a lending institution, or to arrange financing of the sale, or to advance any of the purchaser's funds to any lending institution, or that otherwise have the effect of restricting where the purchaser may seek credit;

b. which provide that the seller or purchaser agree to execute a real estate contract or any other document without, at the option of respondent, either (1) setting forth the terms of such real estate contract or other document in the earnest money forms, or (2) setting forth the following language in the earnest money forms: "THIS AGREEMENT IS VOID without further action by any of the parties hereto unless a copy of the blank real estate contract form which the parties agree to execute is provided to the parties hereto prior to their signing this agreement.

I/WE ACKNOWLEDGE RECEIPT OF BLANK REAL ESTATE CONTRACT FORM NO. ______________ ISSUED BY ______________ PRIOR TO THE SIGNING OF THIS AGREEMENT.

______________ ______________

______________ ______________

Purchaser(s) Seller(s)"

c. which provide for delivery of the title policy and report preliminary thereto to any party other than the purchaser, or which provide for delivery at any specified place; *Provided*, That nothing herein shall preclude the inclusion of a provision permitting the sending of copies of the preliminary report and title policy to the lender or other closing agent, or other interested parties.

2. Failing to send, by certified mail, return receipt requested, a notice to all purchasers of residential real estate (hereinafter referred to as "covered applicants") who have, after the effective date hereof, both (a) executed an agreement on the form printed and distributed by the respondent which contains the language quoted in Paragraph Five

of the complaint, and (b) filed a loan application with the respondent. Such notice shall be sent within two business days of the receipt of the loan application by any representative of Kassler & Co. and shall advise the covered applicant that he may withdraw his loan application without costs, obligations or penalties by delivering or posting written notice to respondent of his determination to do so within ten calendar days of receipt of the required notice from respondent. The notices described herein, which shall include a blank form of loan withdrawal notice, shall be sent by the respondent in the language, form and manner, and with the enclosures, approved by the Seattle Regional Office of the Federal Trade Commission or other representative designated by the Commission.

3. Failing to allow all covered applicants to withdraw their application for credit without costs, obligations or penalties if the respondent receives a loan application withdrawal notice as described above in subparagraph 2.

4. Failing to make contact in person with each real estate office to which respondent may have distributed earnest money agreement forms which contain the language stated in Paragraph Five of the complaint, and to use its best efforts to obtain possession of such earnest money agreement forms from the agent, and to destroy such forms.

It is further ordered, That respondent maintain at all times in the future, for a period, in each case, of not less than one year, complete records relative to the manner and form of its continuing compliance with the above terms and provisions of this order.

It is further ordered, That respondent deliver a copy of this order to cease and desist to the heads of each operating division and separate office within the company and to the heads of each region and branch office, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondent notify the Commission at least thirty days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

ADOLPH COORS COMPANY

MODIFYING ORDER, IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8845. Decision, July 24, 1973 - Modifying Order, Feb. 4, 1975

Order modifying an earlier order dated July 24, 1973, 83 F.T.C. 32, 38 F.R. 23399, pursuant to decision and judgment of June 4 and 21, 1974, respectively, of the United States Court of Appeals for the Tenth Circuit,* by deleting Paragraphs 12 and 13 of the order which rewrite the termination provisions of respondent's distributor contracts.

Appearances

For the Commission: *Anthony Low Joseph* and *Thomas V. Vakerics.*

For the respondent: *Leo N. Bradley, Earl K. Madsen, Bradley, Campbell & Carney,* Golden, Colo.

ORDER MODIFYING ORDER TO CEASE AND DESIST

Respondent, having filed in the United States Court of Appeals for the Tenth Circuit on Aug. 15, 1973, a petition to review and set aside an order to cease and desist issued herein on July 24, 1973, and the Court having rendered its decision on June 4, 1974, and its judgment on June 21, 1974, affirming the order to cease and desist, except for numbered Paragraphs 12 and 13 of the order which it directed be set aside.

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court to read as follows:

ORDER

It is ordered, That respondent Adolph Coors Company and its subsidiaries, successors, assigns, officers, directors, agents, representatives and employees, individually or in concert with others, directly or indirectly, or through any corporate or other device, in connection with the brewing, distribution, offering for sale or sale of beer in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct which has as its purpose or effect the fixing, maintaining, establishing or setting of the

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* *Cert. denied;* Jan. 13, 1975, 419 U.S. 1105.

prices at which distributors sell Coors beer to retailers or the prices at which retailers sell Coors beer to consumers.

2. Publishing, disseminating or providing any price list or other document indicating suggested or mandatory prices for the sale of Coors beer by any distributor to any retailer or any price list or other document indicating suggested or mandatory prices for the sale of Coors beer by any retailer to any consumer.

Provided, however, That nothing contained in this paragraph of the order shall prohibit respondent from complying with the requirements of any state law, provided that when respondent purports to be complying with the state law regarding price suggestions, respondent will specifically advise the Commission of the statute and all court decisions and administrative agency decisions and rulings interpreting said statute pursuant to which it is purporting to act.

3. Publishing, disseminating or providing to any distributor or any retailer any information or suggestions concerning what Coors may believe to be an appropriate or proper markup or profit for Coors beer when the distributor sells to the retailer or when the retailer sells to the consumer or a markup or profit below which the distributor or retailer is advised not to sell Coors beer.

Provided, however, That nothing contained in paragraphs two (2) and three (3) of the order shall prohibit respondent from publishing, disseminating, or providing any price list or other document indicating suggested prices for the sale of Coors beer or suggested markups or profits for Coors beer after three years from the effective date of this order. Two years following the effective date of this order respondent may petition the Commission, upon a showing that competition in the resale of its products has been restored, to be permitted to publish, disseminate or provide suggested prices, markups, and profits as set forth in this proviso.

4. Refusing to sell beer to any Coors distributor or terminating or threatening to terminate any Coors distributor because:

A. the distributor has in the past or might in the future sell Coors beer at prices, markups, or profits different from those approved or recommended by respondent;

B. one or more of the distributor's customers sold Coors beer or advertised Coors beer for sale at prices, markups, or profits different from those approved or recommended by respondent;

C. the Coors distributor sold Coors beer to another distributor or to a retailer whose business is located outside of the territory granted to the distributor; or

D. the Coors distributor distributes, has distributed, or proposes to distribute in the future the product of another brewer.

5. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct to fix, establish, limit or restrict the territory in which or the persons to whom a distributor may sell Coors beer.

Provided, however, That nothing contained in this paragraph of the order shall prohibit respondent from complying with the requirements of any state law, *Provided,* That when respondent purports to be complying with a state law requiring the restriction of territories or customers, respondent will specifically advise the Commission of the statute and all court decisions and administrative agency decisions and rulings interpreting said statute pursuant to which it is purporting to act.

6. Allocating Coors beer among its distributors in times of beer shortage at the Coors brewery, by any means other than by allocating shares to distributors equal to their proportionate purchases of Coors beer from the brewery during the last three months before the allocation or when the distributor has not been in business for more than a year as a Coors distributor, on some other equitable basis.

7. Refusing to deliver all of a distributor's order because the distributor has made sales to customers outside of the territory granted the distributor or because the distributor or the distributor's customer is selling Coors beer at prices, markups or profits lower than those approved by respondent.

8. Prohibiting its distributors from selling for central warehouse delivery; *Provided, however,* That respondent can establish refrigeration standards for the central warehouse which are substantially similar to those established for distributors and can require its distributors to be responsible, directly or indirectly, for maintenance of such refrigeration standards and for rotation of Coors beer in the central warehouse and at the retail delivery locations where the beer is redelivered from the central warehouse, if respondent changes its container dating system so that the retailer and the consumer will recognize the date without reference to a code or measuring stick.

9. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct with its distributors which has as its purpose or effect requiring that retailers serve Coors draught beer as their only light-colored draught beer.

10. Entering into, maintaining or enforcing any contract, agreement or understanding, or taking any action or course of conduct with any of its distributors which has as its purpose or effect the requirement that the distributor eliminate, or refrain from obtaining and handling rival brands of beer in order to become or remain a Coors distributor.

11. Hindering, suppressing or eliminating competition or attempt-

ing to hinder, suppress or eliminate competition between or among distributors or between or among retailers handling Coors beer.

It is further ordered, That respondent corporation shall forthwith distribute of copy of this order to each of its operating divisions, to its present and future sales representatives, to its present and future distributors.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

In the event that respondent proposes a change in the corporate respondent, as set forth above, respondent shall require said successor or transferee to file, with the Commission, at the time of respondent's notification, a written agreement to be bound by the terms of this order; *Provided*, That if respondent wishes to present to the Commission any reasons why said order should not apply in its present form to said successor or transferee, respondent shall submit to the Commission a written statement setting forth said reasons at least sixty (60) days prior to the consummation of said succession or transfer.

It is further ordered, That respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Thompson did not participate.

IN THE MATTER OF

SIR CARPET, INC., ET AL.

ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8981. Complaint, July 8, 1974 - Decision, Feb. 6, 1975

Order requiring a Takoma Park, Md., carpet retailer and installer, among other things to cease using bait and switch tactics and other deceptive sales practices.

Appearances

For the Commission: ***Everette E. Thomas, Alice C. Kelleher*** and ***Gary M. Laden.***

For the respondents: *John H. Harman, Coggins, Fireison & Harman*, Wash. D. C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virture of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sir Carpet, Inc., a corporation and Bennett Weiner, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sir Carpet, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business located at 6836 New Hampshire Ave., Takoma Park, Md.

Respondent Bennett Weiner is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business located in the State of Maryland, to purchasers thereof located in various other States of the United States and the District of Columbia, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor coverings, respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of respondents' salesmen to prospective purchasers with respect to their products and services.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

QUALITY WALL-TO-WALL 3 Rooms
100% NYLON PILE CARPET $109

includes carpet, bonded
padding and installation
up to 270 sq. feet

* * * * * * *

FREE VACUUM CLEANER
with the purchase of
Our Deluxe 501
36 sq. yd. minimum

* * * * * * *

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set forth herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing directly or by implication, that:

1. Respondents are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements.
2. Purchasers of the said Dupont 501 Carpet receive a "free" vacuum cleaner.

PAR. 6. In truth and in fact:

1. Respondents' offers are not bona fide offers to sell carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of carpeting. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents' salesmen, who make no effort to sell to the prospective customer the advertised carpeting. Instead, they exhibit what they represent to be the advertised carpeting which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced carpeting or floor coverings of superior quality and texture are thereupon exhibited, which by comparison disparages and demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents' salesmen attempt to sell and frequently do sell the higher priced carpeting.
2. Purchasers of respondents' Dupont 501 Carpet do not receive a free vacuum cleaner. To the contrary, the cost of the "free" gift is added to and regularly included in the selling price of the merchandise sold to the customer.

Therefore, the statements and representations as set forth in

Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents' salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Six above, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

Therefore, the acts and practices as set forth in Paragraph Seven hereof were and are unfair and false, misleading and deceptive acts and practices.

PAR. 8. In the further course and conduct of their aforesaid business, and in connection with the representations set forth in Paragraph Four above, respondents offer carpet with padding and installation included at a price based upon specified areas of coverage. In making such offer, respondents have failed to disclose the material fact that the prices stated for such specified areas of coverage are not applied at the same rate for additional quantities of carpet needed, but are priced substantially higher.

The aforesaid failure of respondents to disclose said material facts to purchasers has the tendency and capacity to lead and induce a substantial number of such persons into the understanding and belief that the prices charged for quantities of carpet needed in excess of the specified areas of coverage will not be substantially higher than the rate indicated by the initial offer.

Therefore, respondents' failure to disclose such material facts was, and is, unfair, false, misleading and deceptive.

PAR. 9. In the further course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents use the term "up to 270 sq. ft." to indicate the quantity of carpeting available at the advertised price.

PAR. 10. The unit of measurement usually and customarily employed in the retail advertising of carpet is square yards. Consumers are accustomed to comparing the price of carpet in terms of price per square yard, therefore respondents' use of the square foot unit of measurement confuses consumers who compare respondents' prices with competitors' prices advertised on a square yard basis.

Furthermore, respondents' use of square foot measurements exaggerates the size or quantity of carpeting being offered, and therefore has the capacity and tendency to mislead consumers into the mistaken belief they are being offered a greater quantity of carpet than is the fact.

Therefore, the acts and practices as set forth in Paragraph Nine hereof were and are unfair, false, misleading and deceptive.

PAR. 11. In the further course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and services of the same general kind and nature as those sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and consitututed, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY JOSEPH P. DUFRESNE, ADMINISTRATIVE LAW JUDGE

NOVEMBER 12, 1974

PRELIMINARY STATEMENT

In a complaint issued on July 8, 1974, in accord with its Rule 3.11, the Federal Trade Commission instituted a proceeding charging respondents with unfair and deceptive representations and unfair acts and practices. Specifically, respondents were charged with advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45). Prior to issuance of the formal complaint, unsuccessful attempts to settle the matter were made.

In their answer to complaint, respondents admitted each material allegation, count and paragraph in the complaint, without prejudice.

They specifically objected to those provisions in the proposed order accompanying the complaint calling for the inclusion in each advertisement by respondents of a notice set off from the text by a black border which would read as follows:

> The Federal Trade Commission has found that we engage in bait and switch advertising; that is, the salesman makes it difficult to buy the advertised product and he attempts to switch you to a higher priced item.

Below, this is referred to as the black border provision.

Commission Rule 3.12(b)(2) provides that when respondent's answer contains an admission of the allegations made in the complaint, the answer constitutes a waiver of hearings. The rule permits respondents to submit proposed findings, conclusions and order, together with reasons therefor and supporting briefs, in accord with Rule 3.46.

Pursuant to these rules, the undersigned ordered both parties to submit such proposed findings of fact, conclusions of law and order, together with reasons and briefs. In their submittal, respondents again admitted the material allegations of the complaint but took exception to the black border provision in the proposed order.

THE BLACK BORDER PROVISION

The provision appears to the undersigned to be more a punishment of respondents than an action oriented toward putting a stop to and preventing recurrence in the future of acts and practices violative of Section 5 of the Federal Trade Commission Act. Rather than being corrective in the traditional sense or calling for affirmative disclosure related to the carpeting sold, the black border provision smacks of a personal requirement that a scarlet letter is to be worn on respondents' chests or that a tattooed number is to be placed on their arms or that a placard is to be hung about their necks proclaiming their having been found guilty of a "crime." To my way of thinking, a requirement of this sort is more a punishment than a corrective action and it is well settled that the Commission may not punish respondents. *Coro, Inc., et al.* v. *Federal Trade Commission*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). The purpose of the Federal Trade Commission Act is protection of the public, not punishment of a wrongdoer. *Gimbel Bros. Inc.* v. *Federal Trade Commission.* 116 F.2d 578 (2d Cir. 1941).

It also is well settled, however, that the Commission may order both affirmative acts and affirmative disclosures and that it has broad discretion in determining the type of order necessary to insure discontinuance of the unlawful practices found. The basic requirement is that the corrective action ordered must be reasonably related to the unlawful practices found to exist. "*Corrective Advertising Orders of the Federal Trade Commission,*" 85 Harvard Law Review 477, 498.

There are many decisions by the courts in which Commission orders calling for mandatory acts or disclosures by respondents were upheld. But, in each I have read, the orders were designed to bring an end to the offensive practice directly or to apprise consumers of factual information regarding a product, rather than by requiring respondents to publicize the fact in all of their advertisements that they have been found to have engaged in bait and switch tactics or some other specific unlawful trade practice. Some examples of the typical "corrective" order cases are: mandatory patent licensing under Section 5 of the F.T.C. Act. *American Cyanamid Co.* v. *Federal Trade Commission,* 363 F.2d 757 (6th Cir. 1966); requiring a disclosure that most states do not accept correspondence courses for admission to the bar. *La Salle Extension University,* 78 F.T.C. 1272 (1971), *aff'd.* No. 71-1648 (7th Cir. Oct. 23, 1973 (unreported)); requiring the makers of "Geritol" to disclose that most persons do not have deficiencies in vitamins the product contains. *The J. B. Williams Co., Inc. and Parkson Advertising Agency, Inc.* v. *Federal Trade Commission,* 381 F.2d 884 (6th Cir. 1967); requiring a disclosure that eating thinly sliced "Profile" bread is not as effective as represented for weight reduction, *ITT Continental Baking Co.,* Docket No. C-2015. 79 F.T.C. 248 (1971); requiring a disclosure that most baldness is of the male pattern type which is not helped by administering respondents' preparation, *Keele Hair & Scalp Specialists, Inc., et al.* v. *Federal Trade Commission,* 275 F.2d 18 (5th Cir. 1960), and numerous others.

Going beyond such requirements are those in which the Commission has required respondents to post a cease and desist order in their place of business and to furnish a copy of the order to consumers on request or to media in which respondents advertise. *Arthur Murray Studio of Washington, Inc., et al.* v. *Federal Trade Commission,* 458 F.2d 622 (5th Cir. 1972), 78 F.T.C. 401 (1971); *Robert W. Ricklefs, t/a Cortland Music Co.,* F.T.C. File No. 702 3348, 1970-1973 Transfer Binder, Trade Reg. Rep., ¶19,632 at p. 21681 (1971); *Nelson James Inc., et al.,* File No. 712 3184, 1970-1973 Transfer Binder, Trade Reg. Rep. ¶19,629, at p. 21681 (1971). The requirements of the orders in the Arthur Murray, Ricklefs, and James cases, however, were the genesis of the add-to-the-contract-and-provide-the-order-to-consumers-on-request provision added to the order herein in substitution for the black border provision (Par. 16, order below).

There has been a consent order recently accepted by the Commission in which respondents agreed to a consent order containing a black border provision. *William D. Campbell, Jr. and Jack S. Owens,* *individually, trading and doing business as Rhode Island Carpets*, Docket No 8946, Oct. 1, 1974 [84 F.T.C. 555]. Most recently, however, the Commission, in otherwise affirming the administrative law judges' initial decisions, deleted black border provisions from cease and desist orders in the matters of *Wilbanks Carpet Specialists, et al.*, Docket No. 8933 (Sept. 24, 1974 [84 F.T.C. 510]) and *Tri-State Carpets, Inc., et al.*, Docket No. 8945 (Oct. 15, 1974 [84 F.T.C. 1078]). Both of those matters were litigated.

In my view, the black border provision called for in the proposed order does not bear a reasonable relationship to the unlawful practices admitted by respondents. Those practices are addressed in other provisions of the proposed order in that it contains anti-bait and switch provisions, cancellation provisions, a requirement that copies of the order are to be sent to the advertising media which respondents use and to sales personnel, etc. *Niresk Industries, Inc., et al.* v. *Federal Trade Commission*, 278 F.2d 337 (7th Cir. 1960); *Federal Trade Commission* v. *National Lead Co. et al.*, 352 U.S. 419 (1957); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952).

These order provisions should bring an end to the bait and switch tactics in which respondents have been engaging and should provide for "* * * disclosure of informative facts in the interest of truth." *Maurice J. Feil, et al., trading as Enurtone Company* v. *Federal Trade Commission*, 285 F.2d 879, 899 (9th Cir. 1960). If they do not and respondents persist in their unlawful practices, they will be risking a District Court awarding $10,000 per violation as a penalty for each violation of the final order (15 U.S.C. §45(1)).

Therefore, having reviewed the complaint, answer, and the briefs submitted, the undersigned, in accord with Commission Rule 3.12(b)(2), makes the following findings of fact, conclusions and order comprising his initial decision.

FINDINGS OF FACT

1. Respondent Sir Carpet, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business located at 6836 New Hampshire Ave., Takoma Park, Md.

Respondent Bennett Weiner is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business located in the State of Maryland, to purchasers thereof located in various other States of the United States and the District of Columbia, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor covering, respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of respondents' salesmen to prospective purchasers with respect to their products and services.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

QUALITY WALL-TO-WALL
100% NYLON PILE CARPET
includes carpet, bonded
padding and installation
up to 270 sq. feet

3 Rooms
$109

* * * * * * *

FREE VACUUM CLEANER
with the purchase of
Our Deluxe 501
36 sq. yd. minimum

* * * * * * *

5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set forth herein, separately and in connection with the oral statements and representation of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing directly or by implication, that:

a. Respondents are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements.

b. Purchasers of the said Dupont 501 Carpet received a "free" vacuum cleaner.

6. In truth and in fact:

a. Respondents' offers are not bona fide offers to sell carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of carpeting. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents' salesmen, who make no effort to sell to the prospective customer the advertised carpeting. Instead, they exhibit what they represent to be the advertised carpeting which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced carpeting or floor coverings of superior quality and texture are thereupon exhibited, which by comparison disparages and demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents' salesmen attempt to sell and frequently do sell the higher priced carpeting.

b. Purchasers of respondents' Dupont 501 Carpet do not receive a free vacuum cleaner. To the contrary, the cost of the "free" gift is added to and regularly included in the selling price of the merchandise sold to the customer.

Therefore, the statements and representations as set forth in Paragraphs 4 and 5 hereof were and are false, misleading and deceptive.

7. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents' salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

> In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs 4 through 6 above, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

Therefore, the acts and practices as set forth in Paragraph 7 hereof were and are unfair and false, misleading and deceptive acts and practices.

8. In the further course and conduct of their aforesaid business, and in connection with the representations set forth in Paragraph 4 above, respondents offer carpet with padding and installation included at a price based upon specified areas of coverage. In making such offer, respondents have failed to disclose the material fact that the prices stated for such specified areas of coverage are not applied at the same rate for additional quantities of carpet needed, but are priced substantially higher.

The aforesaid failure of respondents to disclose said material facts to purchasers has the tendency and capacity to lead and induce a substantial number of such persons into the understanding and belief that the prices charged for quantities of carpet needed in excess of the specified areas of coverage will not be substantially higher than the rate indicated by the initial offer.

Therefore, respondents' failure to disclose such material facts was, and is, unfair, false, misleading and deceptive.

9. In the further course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents use the term "up to 270 sq. ft." to indicate the quantity of carpeting available at the advertised price.

10. The unit of measurement usually and customarily employed in the retail advertising of carpet is square yards. Consumers are accustomed to comparing the price of carpet in terms of price per square yard, therefore respondents' use of the square foot unit of measurement confuses consumers who compare respondents' prices with competitors' prices advertised on a square yard basis.

Furthermore, respondents' use of square foot measurements exaggerates the size or quantity of carpeting being offered, and therefore has the capacity and tendency to mislead consumers into the mistaken belief they are being offered a greater quantity of carpet than is the fact.

Therefore, the acts and practices as set forth in Paragraph 9 hereof were and are unfair, false, misleading and deceptive.

11. In the further course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and services of the same general kind and nature as those sold by respondents.

12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

13. The aforesaid acts and practices of respondents were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of and over respondents and the subject matter of this proceeding.

2. The Complaint herein states a cause of action, and this proceeding is in the public interest.

3. Respondents have committed unfair and deceptive acts and practices in commerce and have engaged in unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Sir Carpet, Inc., a corporation, its successors and assigns, and its officers, and Bennett Weiner, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of carpeting or other merchandise or services.

2. Making representations, directly or indirectly, orally or in writing, purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.

3. Disparaging in any manner, or discouraging the purchase of any merchandise or services which are advertised or offered for sale.

4. Representing, directly or indirectly, orally or in writing, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Failing to maintain and produce for inspection and copying for a period of three years following the date of publication of any advertisement, adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price; and

c. a computation of the net profit from the sales of each advertised product or service at the advertised price.

6. Representing, directly or indirectly, orally or in writing, that any price amount is respondents' regular price for any article of merchandise or service unless said amount is the price at which such merchandise or service has been sold or offered for sale by respondents for a reasonably substantial period of time in the recent, regular course of their business and not for the purpose of establishing fictitious higher prices upon which a deceptive comparison or a "free" or similar offer might be based.

7. Representing, directly or indirectly, orally or in writing, that a purchaser of respondents' merchandise or services will receive a "free" vacuum cleaner or any other "free" merchandise, service, prize or award unless all conditions, obligations, or other prerequisites to the receipt and retention of such merchandise, services, gifts, prizes or awards are clearly and conspicuously disclosed at the outset in close conjunction with the word "free" wherever it first appears in each advertisement or offer.

8. Representing, directly or indirectly, orally or in writing, that any merchandise or service is furnished "free" or at no cost to the purchaser of advertised merchandise or services, when, in fact, the cost of such merchandise or service is regularly included in the selling price of the advertised merchandise or service.

9. Representing, directly or indirectly, orally or in writing, that a "free" offer is being made in connection with the introduction of new merchandise or services offered for sale at a specified price unless the respondents expect, in good faith, to discontinue the offer after a limited time and commence selling such merchandise or service, separately, at the same price at which it was sold with a "free" offer.

10. Representing, directly or indirectly, orally or in writing, that merchandise or service is being offered "free" with the sale of merchandise or service which is usually sold at a price arrived at through bargaining, rather than at a regular price, or where there may be a regular price, but where other material factors such as quantity, quality, or size are arrived at through bargaining.

11. Representing, directly or indirectly, orally or in writing, that a "free" offer is available in a trade area for more than six (6) months in any twelve (12) month period. At least thirty (30) days shall elapse before another such "free" offer is made in the same trade area. No more than three such "free" offers shall be made in the same area in any twelve (12) month period. In such period, respondents' sale in that area of the product or service in the amount, size or quality promoted with the "free" offer shall not exceed 50 percent of the total volume of

its sales of the product or service, in the same amount, size or quality, in the area.

12. Representing, directly or indirectly, orally or in writing, that a product or service is being offered as a "gift," "without charge," "bonus," or by other words or terms which tend to convey the impression to the consuming public that the article of merchandise or service is free, when the use of the term "free" in relation thereto is prohibited by the provisions of this order.

13. Advertising the price of carpet, either separately or with padding and installation included, for specified areas of coverage without disclosing in immediate conjunction and with equal prominence the square yard price for additional quantities of such carpet with padding and installation needed.

14. Advertising any carpeting or floor covering using a unit of measurement not usually and customarily employed in the retail advertising of carpet or which tends to exaggerate the size or quantity of carpeting or floor covering being offered at the advertised price.

15. Contracting for any sale whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

16. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT. ALSO, SINCE WE ARE SUBJECT TO A CEASE AND DESIST ORDER OF THE FEDERAL TRADE COMMISSION IN DOCKET NO. 8981 FOR HAVING ENGAGED IN BAIT AND SWITCH TACTICS, YOU MAY EXAMINE OR HAVE A COPY OF THE COMPLAINT AND ORDER BY ASKING THE SALESMAN SERVING YOU TO PROVIDE IT.

17. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point bold face

type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

[*enter date of transaction*]

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [*Name of seller*], AT [*address of seller's place of business*], NOT LATER THAN MIDNIGHT OF (*date*).

I HEREBY CANCEL THIS TRANSACTION.

____

(*Date*)

____

(*Buyer's signature*)

18. Failing before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

19. Including in any sales contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

20. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

21. Misrepresenting, directly or indirectly, orally or in writing, the buyer's right to cancel.

22. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

23. Negotiating, transferring, selling, or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

24. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

Provided, however, That nothing contained in this order shall relieve respondents of any additional obligations respecting contracts required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent, respondents can apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon showing, shall make such modifications as may be warranted in the premises.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor coverings and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of carpeting or floor coverings and other merchandise, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale, sale of any product, consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent Bennett Weiner, promptly notify the Commission of the discontinuance of his present business or employment and of his affiliations with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the said respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

ORDER PLACING MATTER ON DOCKET FOR REVIEW AND FINAL ORDER

An initial decision by the administrative law judge having been issued in this matter on Nov. 13, 1974, containing a provision that would require respondents' contracts to include a statement that they are subject to a cease and desist order of the Federal Trade Commission "for having engaged in bait and switch tactics" and that the consumer can examine a copy of the complaint and order on request;

And the Commission having determined that this initial decision should be placed on its own docket for review *sua sponte* pursuant to Section 3.53 of its Rules of Practice and modified in accordance with its decision in *Wilbanks Carpet Specialists, Inc.*, Docket 8933 (Sept. 24, 1974) [84 F.T.C. 670], and *Tri-State Carpets Inc.*, Docket 8945 (Oct. 15, 1974) [84 F.T.C. 1078];

Now therefore it is ordered, That the initial decision in this matter be, and it hereby is, placed on the Commission's docket for review; and

It is further ordered, That the said initial decision be, and it hereby is, modified by deleting the portion of the initial decision under the caption "The Black Border Provision" and by striking from paragraph 16 of the order the following sentence: "Also, since we are subject to a cease and desist order of the Federal Trade Commission in Docket No. 8981 for having engaged in bait and switch tactics, you may examine or have a copy of the complaint and order by asking the salesman serving you to provide it;" and

It is further ordered, That, as so modified, the initial decision and order be, and they hereby are, adopted as the decision and order of the Commission.

IN THE MATTER OF

DUOFOLD, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2632. Complaint, Feb. 10, 1975 - Decision, Feb. 10, 1975

Consent order requiring a Mohawk, N.Y., manufacturer and distributor of 2-layer underwear, regular or quilted underwear, sportswear, pajamas, parkas, and related items, among other thing to cease establishing or enforcing resale prices; threatening to terminate dealers who fail to observe suggested resale prices; suggesting resale prices to dealers not lawfully under respondent's control; and publishing price lists, etc., which indicate resale prices without stating on each page that such prices are suggested or approximate.

Appearances

For the Commission; *David DiNardi.*

For the respondent: *Evans, Pirnie & Burdick*, Utica, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Duofold, Inc., a corporation, and more particularly described and referred to hereinafter as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U.S.C. §45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Duofold, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located on Canal St., Mohawk, N.Y.

PAR. 2. Respondent has been and is now engaged in the manufacture, sale and distribution of 2-layer underwear, regular or quilted underwear, sportswear, pajamas, parkas, tenniswear, golf shirts, turtlenecks and related items, hereafter referred to as said products. Respondent distributes and sells said products to authorized dealers throughout the United States for resale to the general public.

PAR. 3. In the course and conduct of its business as aforesaid, respondent has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that respondent has sold and caused and now causes said products to be shipped from the state in which they are manufactured or warehoused to other States of the United States for resale and distribution through it authorized dealers.

PAR. 4. Except to the extent that competition has been hampered or restrained as set forth in this complaint, respondent has been and is now in competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of 2-layer underwear, regular or quilted underwear, sportswear, pajamas, parkas, tenniswear, golf shirts, turtlenecks and related items.

PAR. 5. Respondent, in combination, agreement, understanding and conspiracy with some of its authorized dealers, or with the cooperation or acquiesence of other of its authorized dealers, has for the last several years been engaged in a planned course of action to fix, establish and maintain certain specified uniform prices at which said products are resold. In furtherance of said planned course of action, respondent has for the past several years engaged in the following acts and practices, among others:

(a) Regularly furnishing all of its dealers with price lists and necessary supplements thereto containing the established resale prices;

(b) Establishing agreements, understandings and arrangements with its dealers, some of whom are located in states which do not have fair trade laws, as a condition precedent to the granting of a dealership, that such dealers will maintain its resale prices;

(c) Informing its dealers, by direct and indirect means, that it expects and requires all of its dealers to maintain and enforce its established resale prices, or such dealerships will be terminated;

(d) Permitting its dealers a maximum deviation of five cents from the established resale price on each item without conflicting with respondent's existing policies;

(e) Requiring its dealers to agree not to sell or otherwise supply or furnish said products to anyone who is not an authorized dealer of the respondent;

(f) Soliciting and obtaining from its dealers cooperation and assistance in identifying and reporting dealers who advertise, offer to sell or sell said products at prices lower than the established resale prices, or the maximum five cents deviation;

(g) Directing its salesmen, representatives and other employees to secure and report information identifying any dealer who fails to adhere to and maintain its established resale prices, or the maximum five cents deviation; and

(h) In certain instances threatening to terminate and terminating dealers who fail or refuse to observe, maintain or advertise respondent's established resale prices, or the maximum five cents deviation.

PAR. 6. By means of the aforesaid acts and practices, and more, respondent, in combination, agreement, understanding and conspiracy with certain of its authorized dealers and with the acquiesence of other of its authorized dealers, has established, maintained and pursued a planned course of action to fix and maintain certain specified uniform prices at which said products will be resold.

PAR. 7. The aforesaid acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of said products, and, thus, are to the prejudice and injury of the public, constitute unfair methods of competition in commerce or unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Exhibit A

(Letterhead of Duofold, Inc.)

Dear Dealer:

Duofold, Inc. has entered into an agreement with the Federal Trade Commission relating to the distributional activities and pricing policy of Duofold, Inc. A copy of the consent order entered into pursuant to that agreement is enclosed herewith.

Duofold, Inc. has entered into this agreement solely for the purpose of settling a dispute with the Commission and the agreement and consent order is not to be construed as an admission by Duofold, Inc. that it has violated any of the laws administered by the Commission, or that any of the allegations in the complaint are true and correct. Instead, the order merely relates to the activities of Duofold, Inc. in the future.

In order that you may readily understand the terms of the consent order, we have set forth the essentials of the agreement with the Commission, although you must realize that the consent order itself is controlling rather than the following explanation of its provisions:

(1) Our dealers in your area are free to set their own retail or resale prices for said products.

(2) Duofold, Inc. will not solicit, invite or encourage dealers, or any other persons to report any dealer in your area not following any retail or resale price for any of said products, and, furthermore, will not act on any such reports sent to it.

(3) Duofold, Inc. will not require or induce its dealers in your area to refrain from advertising said products at any price or from selling or offering said products at any price to any person.

Sincerely yours,

/s/ Thompson H. Billington,
President

Enclosure

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers any other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said act, and that complaint should issue stating its charges in that respect, having thereupon accepted the executed consent agreement and place such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Duofold, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located on Canal St., Mohawk, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Duofold, Inc., a corporation, its subsidiaries, successors and assigns, and its officers and directors, and respondent's agents, representatives and employees, individually or in concert, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacture, distribution, offering for sale or sale of 2-layer underwear, regular or quilted underwear, sportswear, pajamas, parkas, tenniswear, golf shirts, turtlenecks and related items or any other products (hereinafter referred to in this order as "said products") in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Establishing, maintaining or enforcing with any dealer any contract, agreement, understanding or arrangement fixing, establishing, maintaining, controlling, influencing or enforcing in any way or to any extent, directly or indirectly, the price at which any of said products is advertised, sold or offered for sale at retail.

B. Requiring any dealer or prospective dealer to enter into an oral or written agreement or understanding that such dealer or prospective dealer will maintain any resale price for any of said products as a condition of buying any of said products.

C. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer, person or firm who does not adhere to any resale price for any of said products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

D. Directing or requiring respondent's salesmen, or any other agent, representative or employee, directly or indirectly, to report any dealer who does not adhere to any resale price for any of said products, or to act on such reports by refusing or threatening to refuse sales to any dealer so reported.

E. Threatening to terminate and terminating, either directly or indirectly, dealers who fail to observe, maintain or advertise the respondent's suggested resale prices.

F. Suggesting, for three (3) years from the date on which this order becomes final, to any reseller whose resale prices are not or cannot lawfully be controlled by respondent in the manner prescribed by law and this order any resale price whatsoever to be charged by such reseller for said products, by price list, discount schedule, invoicing procedure, pre-pricing of commodities or their containers, or by any other means.

G. Requiring from any dealer charged with price cutting or failure to adhere to any suggested resale price, a promise or assurance to adhere to any resale price for any of said products as a condition precedent to any future sales to said dealer.

H. Publishing, disseminating or circulating any price list, price book, price tag, advertising or promotional material, or other document indicating any resale price without stating on each page of such price list, price book, price tag, advertising or promotional material, or other document that the price is suggested or approximate.

I. Requiring or inducing by any means any dealer or prospective dealer to refrain, or to agree to refrain from reselling any of said products to any other dealer or distributor.

Provided, however, Nothing hereinabove shall be construed to waive, limit or otherwise affect the right of respondent to enter into, establish, maintain and enforce in any lawful manner any price maintenance agreement excepted from the provisions of Section 5 of the Federal Trade Commission Act by virtue of the McGuire Act amendments to said Act.

II. *It is further ordered,* That the respondent herein shall within sixty (60) days after service upon it of this order, mail a copy of this order to each of its dealers in the States of Alabama, Alaska, Hawaii, Kansas, Mississippi, Missouri, Montana, Nebraska, Nevada, Rhode Island, Texas, Utah, Vermont, Wyoming, and the Commonwealth of Puerto Rico and the District of Columbia, and, during the five (5) year period of time following the date of service of this order, to all future dealers in these jurisdictions at the time said dealers are opened as accounts, under cover of the letter annexed hereto as Exhibit A, and furnish the Commission proof of the mailing thereof.

III. *It is further ordered,* That the respondent herein shall forthwith distribute a copy of this order to each of its operating divisions and to all of its sales personnel and shall instruct each salesperson employed by it now or in the future to read this order and to be familiar with its provisions.

IV. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

V. *It is further ordered,* That the respondent herein for a period of five (5) years from the date of this signing establish and maintain a file of all records referring or relating to respondent's refusal to sell said products to any dealer, which file shall contain a record of a communication to each such dealer explaining respondent's refusal to sell, and which file will be made available for Commission inspection on reasonable notice; and, annually, for a period of five (5) years from the date thereof, submit a report to the Commission's Boston Regional Office listing the names of all dealers with whom respondent has refused to deal over the preceding year, a description of the reason for the refusal and the date of the refusal.

VI. *It is further ordered*, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

W. M. BARR & COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2633. Complaint, Feb. 10, 1975 - Decision, Feb. 10, 1975

Consent order requiring a Memphis, Tenn., manufacturer and seller of paint removers and chemical specialties for the paint industry, among other things to cease misrepresenting the safety of its products; using the word "safe" in any advertisements regarding its products; and making any representations which contradict or are inconsistent with warnings on product labels.

Appearances

For the Commission: *Miriam A. Bender.*
For the respondent: *Pro se.*

COMPLAINT

Pursuant to the Federal Trade Commision Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that W. M. Barr & Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent W. M. Barr & Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 2336 So. Lauderdale, Memphis, Tenn. Its mailing address is P.O. Box 1879, Memphis, Tenn.

PAR. 2. Respondent is now, and for some time last past has been engaged in the manufacture and sale of paint removers and chemical specialties for the paint industry.

PAR. 3. In the course and conduct of its business as aforesaid, respondent now causes, and for some time last past has caused the said products, when sold, to be transported from its place of business in one State of the United States to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its said business, and for the purpose of inducing the purchase of its paint removers, respondent has made, and is now making, numerous statements and representations in advertising printed in various journals and in other promotional materials concerning the safety and efficacy of these products.

PAR. 5. Typical and illustrative of the statements and representations in said advertising and promotional materials disseminated as aforesaid, but not all inclusive thereof, are the following:

> Are you selling the SAFER REMOVER? Is it NON-POISONOUS? Is it FIREPROOF? HEAVY-BODIED KLEAN-STRIP "IS" SAFER!
>
> [Klean Strip's] non-poisonous formula makes it safer to have in the home * * *. Nonflammable, non-explosive formula is safer for anywhere.
>
> Klean Strip * * * The Safer Remover.

PAR. 6. Through the use of the aforesaid statements, respondent has represented, directly or by implication, that their Klean-Strip Paint Removers are safe, non-toxic or hazard-free products.

PAR. 7. In truth and in fact the aforesaid product is not safe, non-toxic or hazard-free. Labels affixed to these products specifically warn users that the product is harmful if swallowed, may cause skin irritation, and should not be taken internally, that inhalation of its vapors should be avoided, and that the product should be kept out of the reach of children.

Therefore, the statements and representations set forth in Paragraph Five hereof were, and are, misleading and deceptive.

PAR. 8. By advertising Klean-Strip Paint Remover in a manner which substantially varies from and disregards warnings and instructions for use found on the labels of such products, respondent negates the import and detracts from the effectiveness of such warnings and instructions.

Therefore, by disseminating advertising and other promotional material referred to in Paragraph Eight above, respondent has committed unfair or deceptive acts or practices.

PAR. 9. The use of safety claims regarding products which are required to carry precautionary labeling is in itself unfair and has the capacity and tendency to mislead and deceive users of such products into the erroneous and mistaken belief that they are handling safe products.

Therefore, by disseminating advertising and other promotional materials with safety claims for such products, respondent has committed unfair or deceptive acts or practices.

PAR. 10. In the course and conduct of its business as aforesaid and at all times mentioned herein respondent has been in substantial competition, in commerce, with corporations, firms and individuals, in the sale of paint removers and chemical speciality products of the same general kind and nature as that sold by respondents.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and respondent's competitors, and constitute unfair or deceptive acts or practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent W. M. Barr & Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located at 2336 So. Lauderdale, Memphis, Tenn.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent, W. M. Barr & Company, a corporation, its successors and assigns, and respondent's officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any of its products with precautionary labeling, (sometimes referred to hereinafter as "such products") do forthwith cease and desist from:

I

A. Representing, directly or by implication, orally or in writing, that Klean-Strip Paint Remover, or any other such products, are safe, non-toxic, non-injurious, non-poisonous, non-hazardous.

B. Using the word safe, or any form thereof, in any advertisement, promotional material or other representation regarding such products.

C. Making any representation, directly or by implication, orally or in writing, which contradicts, is inconsistent with or detracts from the effectiveness of any warning, caution or direction for use required to be set forth on the label or labeling of such product.

II

It is further ordered, That respondent forthwith distribute a copy of this order to each of its operating divisions engaged in the manufacture, sale, promotion, advertising or distribution of products subject to this order, and to all present and future employees or respondent engaged in the advertising, promotion, sale or distribution of such products.

III

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

IV

It is further ordered, That respondent corporation shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the provisions of this order.

IN THE MATTER OF

MEN'S MARKET SERVICE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2(C) OF THE CLAYTON ACT

Docket C-2634. Complaint, Feb. 11, 1975 - Decision, Feb. 11, 1975

Consent order requiring a New York City manufacturer and seller of men's clothing and its affiliated merchandising service, among other things to cease inducing discriminatory price reductions or advertising allowances from suppliers.

Appearances

For the Commission: *Paul N. Kane.*

For the respondents: *Charles L. Stewart* for *Hart, Schaffner & Marx*, Chicago, Ill. and *Lee N. Abrams, Mayer, Brown & Platt*, Chicago, Ill.

COMPLAINT

The Federal Trade Commission having reason to believe that Men's Market Service, Inc. and Hart Schaffner & Marx, each of which is named in the caption hereof and is hereinafter more particularly described and referred to as a respondent, having violated the provisions of Section 2 of the Clayton Act, as amended (15 U.S.C. §13) and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45), as hereinafter more particularly designated and described, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in respect thereto as follows:

PARAGRAPH 1. Respondent Men's Market Service, Inc., hereinafter MMS, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and place of business located at Suite 1304, 1290 Avenue of the Americas, N. Y., N. Y. MMS is a wholly-owned subsidiary of Wallach's, Inc., a New York corporation which is a wholly-owned subsidiary of respondent Hart

Schaffner & Marx, hereinafter HSM. The HSM menswear stores purchase a wide variety of merchandise. MMS selects a small portion of the total and recommends it to executives of HSM menswear stores for purchase by their stores. MMS represents HSM menswear stores in negotiations with suppliers of such merchandise, concerning patterns, styles, specifications, delivery dates, delivery places, prices and other terms and conditions of purchase by HSM menswear stores of the items of merchandise recommended by MMS.

PAR. 2. Respondent Hart Schaffner & Marx is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its main office and principal place of business located at 36 S. Franklin St., Chicago, Ill. HSM also maintains an office and showroom in Suite 2014, 1290 Avenue of the Americas, New York, N.Y.

HSM through various subsidiaries is engaged in the manufacture of apparel products (including, *inter alia*, men's tailored clothing, men's raincoats, women's and children's jeans and men's jackets and active sportswear), the sale of such products to chain and independent retail apparel and department stores throughout the United States, and the operation, through wholly-owned subsidiaries, of 234 retail mens' specialty stores, herein sometimes referred to as HSM menswear stores, in 67 metropolitan areas throughout most of the United States.

Brands under which respondent HSM and its subsidiaries and divisions market one or more of the above kinds of products include Hart Schaffner & Marx, Hickey-Freeman, Society Brand, Johnny Carson, Austin Reed of Regent Street, Jaymar, Gleneagles, and California Sportswear. The HSM retail stores include such groups of HSM menswear stores as Wallach's, Inc., F. R. Tripler & Co., and Field Bros. in the New York metropolitan area, Baskin and Capper & Capper in the Chicago metropolitan area, F. B. Silverwood in the Los Angeles metropolitan area, Jack Henry Clothing Co. in the Kansas City metropolitan area, Hastings in the San Francisco and Sacramento metropolitan areas, and Klopfenstein's Inc. and Littler's, Inc. in the Seattle metropolitan area, as well as similar menswear store groups in other metropolitan areas.

Sales of said 234 HSM menswear stores during the fiscal year ended Jan. 31, 1974 were in excess of $235,000,000.

PAR. 3. The HSM menswear stores are among the menswear specialty stores which emphasize quality and fashion and in which a substantial percentage of the items sold has a relatively high value. The HSM menswear stores sell men's tailored clothing (suits, sport coats, slacks, formal wear and outerwear) as well as men's furnishings (men's shirts, sweaters, neckties, scarves, mufflers, robes, pajamas, underwear, socks, handkerchiefs, belts, wallets, toiletries, gift items and various other items of merchandise). The men's tailored clothing and the men's furnishings so sold are procured in part from the manufacturing divisions of respondent HSM and in part from other vendors selected upon a basis of quality materials, styles and patterns.

PAR. 4. MMS employs experienced buyers of men's furnishings to shop markets in the United States and abroad for dependable sources of supply, sometimes hereinafter referred to as suppliers, for men's furnishings suitable in quality and fashion for resale by HSM menswear stores. These MMS buyers also receive advice and recommendations from experienced buyers employed by some of the larger groups of HSM menswear stores. When the MMS shoppers find a suitable item from a dependable supplier, the supplier is permitted to display samples of the products, chosen by said shoppers, in the MMS office or the HSM office and showroom at 1290 Avenue of the Americas in New York City. MMS recommends to the HSM menswear stores that they purchase such selected products and MMS designates each such supplier a "preferred resource." Periodically MMS furnishes the HSM menswear stores a list of such "preferred resources." Purchases are made for the HSM menswear stores by their respective buyers or other officers who periodically visit the aforesaid MMS office and HSM office and showroom, examine the samples on display, and write purchase orders for their respective store or group of stores. Purchase orders are sent to the supplier involved either directly or indirectly through MMS. Whether an order is submitted directly or indirectly, a copy is furnished to MMS for accounting purposes. Thereafter the supplier bills and ships the merchandise directly to the ordering store or group of stores.

After selecting an item to recommend for purchase by HSM menswear stores, MMS has sought to ascertain from the supplier thereof the nature and amount of cost savings which such supplier expected to derive as a result of the advance ordering, large cumulative total quantities and manner of purchasing of that item by HSM menswear stores. Based upon such information MMS has solicited, from vendors who expected to derive such cost savings percentage rebates representing all or a portion of such cost savings, such rebates to be paid to MMS at the end of a season or at the end of a year, for distribution by MMS among the HSM menswear stores in proportion to the purchases by the respective store or group of stores of the specific items purchased by said store or group of stores during a season or a year. The majority of the "preferred resources" do not grant or pay such rebates. Prior to 1970, MMS solicited and received from some of such "preferred resources" percentage rebates based in part on cost savings derived by said suppliers from their elimination of, or reduction in, their salesmen's commissions.

The rebates received by MMS, for distribution to HSM menswear stores totaled $205,120.00 in the fiscal year ended Jan. 31, 1969. In the fiscal year ended Jan. 31, 1974, the volume of these rebates was $102,936.46. The number of suppliers paying such rebates declined in the same period from 25 to 9.

PAR. 5. In the course and conduct of their business, MMS and HSM are now and at all times herein mentioned have been engaged in "commerce" as that term is defined in the Clayton and Federal Trade Commission Acts, as amended, in that men's furnishings and other products of suppliers manufacturing them in different states or countries are purchased by and delivered to HSM menswear stores in states other than states or countries of production or origin of shipment, by means of transactions herein alleged.

COUNT I

PAR. 6. Paragraphs One through Five are hereby adopted and made a part of this Count as fully as if herein set out verbatim.

PAR. 7. In the course and conduct of their business in commerce, as aforesaid, and in connection with MMS's inducement and receipt, or receipt, of rebates on purchases from acceding suppliers, respondent MMS during 1969 and prior years received and accepted amounts which in whole or in part acceding suppliers normally paid as commissions to their salesmen.

Typically, such suppliers reduced their salesmen's commissions by amounts which represented at least one-half the amount of the rebate granted to respondent MMS.

PAR. 8. The acts and practices of respondents in receiving and accepting amounts of money, which reflected in whole or in part amounts normally paid as commissions to suppliers' salesmen, constituted violations of the provisions of subsection (c) of Section 2 of the Clayton Act, as amended.

COUNT II

PAR. 9. Paragraphs One through Five are hereby adopted and made a part of this Count as fully as if herein set out verbatim.

PAR. 10. In the course of its business in commerce, as aforesaid, respondent HSM through its menswear stores, is now and has been in active competition with other corporations, firms and individuals also engaged in the purchase for resale, sale and distribution within the United States, of various products, including men's furnishings.

PAR. 11. In the further course and conduct of its business in commerce, respondent MMS and the HSM menswear stores have induced the receipt of advertising allowances from suppliers to help defray the cost of advertising their products in seasonal catalogs distributed by the HSM menswear stores to their customers. Respondent HSM prepares and distributes to the HSM menswear stores an annual seasonal catalog which advertises men's furnishings among other products. Respondents MMS and HSM negotiate with suppliers of items which will be advertised therein to contribute to the cost of the catalog. Contributions so induced to this program by participating suppliers in 1972 totalled $72,000. The advertising allowances granted by such suppliers prior to 1973 were dependent upon the cumulative total of items advertised in the catalog which were purchased by all HSM menswear stores combined. Prior to 1973, respondents did not make arrangements to assure that every such contributing supplier had made a cooperative advertising plan available whereby all of the contributing suppliers' customers competing with HSM menswear stores could receive proportionally equal advertising allowances. Respondents knew or should have known that some of said suppliers were selling goods to customers who were competing with some of the HSM menswear stores and that they were inducing and receiving, or were receiving, from suppliers, payments or allowances for advertising in the seasonal catalogs which some of said suppliers were not offering or otherwise making available on proportionally equal terms to other customers who were competing with HSM menswear stores in the sale and distribution of said suppliers' products.

PAR. 12. In the further course of their business in commerce, rebates and advertising allowances were received from preferred resources, even though such rebates and allowances granted by such suppliers were dependent upon the cumulative total of purchases made by all HSM menswear stores although separate delivery must be made to separate groups of stores.

PAR. 13. The capacity, tendency and effect of respondents' acts and practices has been, and if allowed to continue may be, to:

(a) Obtain cooperative advertising allowances from suppliers to help defray the costs of advertising such suppliers' products in a seasonal catalog distributed by HSM menswear stores regardless of whether proportionally equal advertising allowances are available from such suppliers to all customers competing with one or more HSM menswear stores.

(b) Gain preferential treatment from suppliers, solely on the basis of the anticipated substantiality of the aggregate purchases of HSM menswear stores, and

(c) Injure competition with the HSM menswear stores in the resale of products so purchased and so advertised.

PAR. 14. The aforesaid acts and practices of respondents constitute unfair methods of competition and unfair acts or practices in commerce within the intent and meaning, and in violation, of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 2 of the Clayton Act, as amended and Section 5 of the Federal Trade Commission Act, as amended.

Respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that respondents have violated the said acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Sec. 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Men's Market Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at Suite 1304, 1290 Avenue of the Americas, N. Y., N.Y.

2. Respondent Hart Schaffner & Marx is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 36 S. Franklin St., Chicago, Ill.

3. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

I

It is ordered, That the respondent corporations, Men's Market Service, Inc. and Hart Schaffner & Marx, their respective successors, assigns, officers, agents, representatives, and employees, in connection with the centralized selection, recommendation and negotiation of net prices for the purchase for resale by Hart Schaffner & Marx menswear stores of any product in commerce, as "commerce" is defined in the Clayton Act, shall not receive or accept, or arrange directly or indirectly for any subsidiary operating HSM menswear stores to receive or accept, from any supplier or from anyone acting for or in behalf of or who is subject to the direct or indirect control of such supplier, any rebate or discount in lieu of brokerage, by purchasing products from such supplier at net prices reflecting a reduction from the net prices at which sales of such products of like grade and quality are being effected by such supplier to competing purchasers, where such reduction in net price exceeds the cost savings derived by said supplier in manufacture, sale or delivery to HSM menswear stores; provided that said cost savings derived by any such supplier shall not include savings derived from a reduction in the regular rate of commission, brokerage or other compensation currently being paid by said supplier for sales services.

II

It is further ordered, That respondents Men's Market Service, Inc. and Hart Schaffner & Marx, their respective successors, assigns, officers, agents, representatives, employees, and subsidiaries operating HSM menswear stores, in connection with the purchase for resale by said HSM menswear stores in competition with other purchasers from the same suppliers of goods of like grade and quality, of any product in commerce, as "commerce" is defined in the Clayton Act, shall not:

(a) Induce suppliers to grant discriminatory discounts, rebates or other reductions in net prices to or for the benefit of HSM menswear stores, except to meet the lawful net prices offered by a competitor, where such reduction in net price exceeds the cost savings derived by said supplier in manufacture, sale or delivery to HSM menswear stores.

(b) Induce suppliers to grant catalog advertising allowances or other advertising allowances directly or indirectly to HSM menswear stores, unless such allowances are available on proportionally equal terms to all competitors of such HSM menswear stores purchasing from said suppliers' products of like grade and quality.

For the purpose of determining "net price" under the terms of Paragraphs I and II of this order, there shall be taken into account all discounts and rebates or other terms and conditions of sale by which net prices are affected.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in either corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect its compliance obligations arising out of this order.

It is further ordered, That respondents furnish a copy of this order to all suppliers of merchandise purchased for resale by HSM menswear stores who, currently and during the five years preceding the date of this order, are and were designated "preferred resources" and to all future such suppliers of such merchandise for a ten year period following the date of this order, and respondent HSM shall also furnish a copy of this order to each of its subsidiaries operating menswear stores.

It is further ordered, That respondents shall, within 60 days after service upon them of this order, file with the Commission reports in writing setting forth in detail the manner and form in which they have complied and will comply with this order.

IN THE MATTER OF

AUTOMATED BUILDING COMPONENTS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 3 OF THE CLAYTON ACT

Docket C-2635. Complaint, Feb. 13, 1975 - Decision, Feb. 13, 1975

Consent order requiring a Miami, Fla., manufacturer and distributor of truss fabricating equipment and truss connecting plates, among other things to cease tying the sale of wood roof truss connecting plates and/or engineering services to the sale, lease or license of fabricating equipment.

Appearances

For the Commission: *Michael H. Abrams* and *Duncan J. Farmer*.

For the respondent: *Robert M. Goolrick, Steptoe & Johnson*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. §41, *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Automated Building Components, Inc., a corporation, sometimes referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45), and Section 3 of the Clayton Act (15 U.S.C. §14), and it appearing to the Commission that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint stating the following:

PARAGRAPH 1. Respondent Automated Building Components, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida with its principal place of business located at 7525 N.W. 37th Ave., Miami, Fla.

PAR. 2. Respondent Automated Building Components, Inc., is now, and for some time last past has been engaged in the manufacture and distribution (by sale, lease and/or license) of truss fabricating equipment; the manufacture and sale of truss connecting plates; and the design and sale of engineering services in connection therewith.

PAR. 3. In the course and conduct of its business, respondent Automated Building Components, Inc., now causes, and has caused in the past, its products, when sold, leased, and/or licensed, to be shipped from its place of business in the State of Florida to purchasers, lessees and/or licensees thereof in other states, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that actual and potential competition has been lessened, restricted and restrained by reason of the practices hereinafter alleged, respondent Automated Building Components, Inc., has been and is now engaged in competition with firms, partnerships, and corporations engaged in the manufacture and distribution of truss fabricating equipment, the manufacture and sale of truss connecting plates, and the design and sale of engineering services.

PAR. 5. In the course and conduct of its business as described above, respondent Automated Building Components, Inc., has offered, entered into and enforced agreements with purchasers, lessees and/or licensees of its truss fabricating equipment which require such purchasers, lessees and/or licensees, as a condition to the purchase, lease or license of truss fabricating equipment from said respondent, to purchase truss connecting plates and/or engineering services from said respondent.

PAR. 6. The effect of the aforesaid agreements has been and may be to substantially lessen competition in the manufacture and sale of truss connecting plates and the design and sale of engineering services.

PAR. 7. The acts, practices and methods of competition alleged herein constitute tying agreements or practices by respondent in violation of Section 3 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

PAR. 8. The acts, practices and methods of competition alleged herein constitute unfair methods of competition or unfair acts or practices by respondent in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Automated Building Components, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 7525 N.W. 37th Ave., Miami, Fla.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

For purposes of this order, the following definitions shall apply:

A. The term "respondent" refers to Automated Building Components, Inc., a corporation, and its subsidiaries, affiliates, successors, assigns, officers, agents, representatives and employees.

B. The term "truss fabricating equipment" refers to all machinery and equipment sold, leased, or licensed by respondent to be used in the assembly, production and construction of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

C. The term "truss connecting plates" refers to all metal plates bearing any number of nails or other sharp devices used to permanently connect the joints of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

D. The term "engineering services" refers to design specification services provided by respondent in connection with the assembly, production and construction of wood roof trusses, and the selection and designation of truss connecting plates deemed necessary for the proper support of said trusses.

II

It is ordered, That respondent, directly or indirectly through any corporate or other device, in connection with the sale, lease or license of truss fabricating equipment, truss connecting plates and/or engineering services in the United States shall, within thirty (30) days after entry of this order, cease and desist from:

1. Offering, entering into or enforcing any agreement or provision of any agreement, express or implied, which in any way requires or obligates any purchaser, lessee or licensee of respondent's truss fabricating equipment, as a condition to the execution or continuation of a purchase, lease or license agreement with respect to such equipment, to purchase or agree to purchase all or any part of such purchaser's, lessee's or licensee's requirements of truss connecting plates and/or engineering services from respondent or from any source designated by respondent.

2. Offering, allowing or granting a price discount, rental or royalty reduction, rebate, or other valuable consideration on or with respect to the sale, lease or license of respondent's truss fabricating equipment which is in any way based upon purchases of truss connecting plates

and/or engineering services from respondent or from any source designated by respondent.

3. Requiring any of its purchasers, lessees or licensees of truss fabricating equipment to purchase truss connecting plates and any other products from respondent or from any source designated by respondent.

III

It is further ordered, That respondent shall:

1. Within thirty (30) days after entry of this order, mail a letter on its stationery, signed by the officers of the respondent and enclosing a copy of this order, to all of its purchasers, lessees, and/or licensees of truss fabricating equipment who have purchased truss connecting plates from it during the twenty-four (24) months preceding entry of this order which informs each such purchaser, lessee or licensee of the prohibitive terms of this order.

2. Notify, during the five (5) year period after entry of this order, each new prospective purchaser, lessee or licensee of its truss fabricating equipment (excluding replacement parts) of the prohibitive terms of this order on its first written proposal to each such new prospective purchaser, lessee or licensee.

3. Within ten (10) days after entry of this order, provide a copy of this order to each of its salesmen, sales agents and sales representatives.

4. Within thirty (30) days after entry of this order, and continuing thereafter, make available its manuals concerning its standard wood roof truss designs, including updated standard wood roof truss designs, to any truss fabricator desiring such manuals; nothing contained in this order shall prohibit respondent from charging a reasonable fee for such manuals.

5. Within sixty (60) days after entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

6. Notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IN THE MATTER OF

HYDRO-AIR ENGINEERING, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 3 OF THE CLAYTON ACT

Docket C-2636. Complaint, Feb. 13, 1975 - Decision, Feb. 13, 1975

Consent order requiring a St. Louis, Mo., manufacturer and distributor of truss fabricating equipment and truss connecting plates, among other things to cease tying the sale of wood roof truss connecting plates and/or engineering services to the sale, lease or license of fabricating equipment.

Appearances

For the Commission: *Duncan J. Farmer.*
For the respondent: *Miles W. Kirkpatrick*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. §41, *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Hydro-Air Engineering, Inc., a corporation, sometimes referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45), and Section 3 of the Clayton Act, as amended (15 U.S.C. §14), and it appearing to the Commission that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint stating the following:

PARAGRAPH 1. Respondent Hydro-Air Engineering, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its principal place of business located at 1201 S. Vandeventer Ave., St. Louis, Mo.

PAR. 2. Respondent Hydro-Air Engineering, Inc., is now, and for some time last past has been engaged in the manufacture and distribution (by sale, lease and/or license) of truss fabricating equipment; the manufacture and sale of truss connecting plates; and the design and sale of engineering services in connection therewith.

PAR. 3. In the course and conduct of its business, respondent Hydro-Air Engineering, Inc., now causes, and has caused in the past, its products, when sold, leased, and/or licensed, to be shipped from its place of business in the State of Missouri to purchasers, lessees and/or licensees thereof in other states, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that actual and potential competition has been lessened, restricted and restrained by reason of the practices hereinafter alleged, respondent Hydro-Air Engineering, Inc., has been and is now engaged in competition with firms, partnerships, and corporations engaged in the manufacture and distribution of truss fabricating equipment, the manufacture and sale of truss connecting plates, and the design and sale of engineering services.

PAR. 5. In the course and conduct of its business as described above, respondent Hydro-Air Engineering, Inc., has offered, entered into and enforced agreements with purchasers, lessees and/or licensees of its truss fabricating equipment which require such purchasers, lessees and/or licensees, as a condition to the purchase, lease or license of truss fabricating equipment from said respondent, to purchase truss connecting plates and/or engineering services from said respondent.

PAR. 6. The effect of the aforesaid agreements has been and may be to substantially lessen competition in the manufacture and sale of truss connecting plates and the design and sale of engineering services.

PAR. 7. The acts, practices and methods of competition alleged herein constitute tying agreements or practices by respondent in violation of Section 3 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

PAR. 8. The acts, practices and methods of competition alleged herein constitute unfair methods of competition or unfair acts or practices by respondent in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said Agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Hydro-Air Engineering, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 1210 S. Vandeventer Ave., St. Louis, Mo.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

For purposes of this order, the following definitions shall apply:

A. The term "respondent" refers to Hydro-Air Engineering, Inc., a corporation, and its subsidiaries, affiliates, successors, assigns, officers, agents, representatives and employees.

B. The term "truss fabricating equipment" refers to all machinery and equipment sold, leased, or licensed by respondent to be used in the assembly, production and construction of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

C. The term "truss connecting plates" refers to all metal plates bearing any number of nails or other sharp devices used to permanently connect the joints of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

D. The term "engineering services" refers to design specification services provided by respondent in connection with the assembly, production and construction of wood roof trusses, and the selection and designation of truss connecting plates deemed necessary for the proper support of said trusses.

II

It is ordered, That respondent, directly or indirectly through any corporate or other device, in connection with the sale, lease or license of truss fabricating equipment, truss connecting plates and/or engineering services in the United States shall, within thirty (30) days after entry of this order, cease and desist from:

1. Offering, entering into or enforcing any agreement or provision of any agreement, express or implied, which in any way requires or obligates any purchaser, lessee or licensee of respondent's truss fabricating equipment, as a condition to the execution or continuation of a purchase, lease or license agreement with respect to such equipment, to purchase or agree to purchase all or any part of such purchaser's, lessee's or licensee's requirements of truss connecting plates and/or engineering services from respondent or from any source designated by respondent.

2. Offering, allowing or granting a price discount, rental or royalty reduction, rebate, or other valuable consideration on or with respect to the sale, lease or license of respondent's truss fabricating equipment which is in any way based upon purchases of truss connecting plates and/or engineering services from respondent or from any source designated by respondent.

3. Requiring any of its purchasers, lessees or licensees of truss fabricating equipment to purchase truss connecting plates and any other products from respondent or from any source designated by respondent.

III

It is further ordered, That respondent shall:

1. Within thirty (30) days after entry of this order, mail a letter on its stationery, signed by the officers of the respondent and enclosing a copy of this order, to all of its purchasers, lessees, and/or licensees of truss fabricating equipment who have purchased truss connecting plates from it during the twenty-four (24) months preceding entry of this order which informs each such purchaser, lessee or licensee of the prohibitive terms of this order.

2. Notify, during the five (5) year period after entry of this order, each new prospective purchaser, lessee or licensee of its truss fabricating equipment (excluding replacement parts) of the prohibitive terms of this order on its first written proposal to each such new prospective purchaser, lessee or licensee.

3. Within ten (10) days after entry of this order, provide a copy of this order to each of its salesmen, sales agents and sales representatives.

4. Within thirty (30) days after entry of this order, and continuing thereafter, make available its manuals concerning its standard wood roof truss designs, including updated standard wood roof truss designs, to any truss fabricator desiring such manuals; nothing contained in this

order shall prohibit respondent from charging a reasonable fee for such manuals.

5. Within sixty (60) days after entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

6. Notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IN THE MATTER OF

J. D. ADAMS COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 3 OF THE CLAYTON ACT

Docket C-2637. Complaint, Feb. 13, 1975 - Decision, Feb. 13, 1975

Consent order requiring a Colorado Springs, Colo., manufacturer and distributor of truss fabricating equipment and truss connecting plates, among other things to cease tying the sale of wood roof truss connecting plates and/or engineering services to the sale, lease or license of fabricating equipment.

Appearances

For the Commission: *Michael H. Abrams* and *Duncan J. Farmer.*
For the respondent: *Ronald F. Lipps*, Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41, *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that J. D. Adams Company, a corporation, sometimes referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and Section 3 of the Clayton Act (15 U.S.C. 14), and it appearing to the Commission that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint stating the following:

PARAGRAPH 1. Respondent J. D. Adams Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its principal place of business located at 4045 Sinton Rd., P. O. Box 7462, Colorado Springs, Colo.

PAR. 2. Respondent J. D. Adams Company is now, and for some time last past has been engaged in the manufacture and distribution (by sale, lease and/or license) of truss fabricating equipment; the manufacture and sale of truss connecting plates; and the design and sale of engineering services in connection therewith.

PAR. 3. In the course and conduct of its business, respondent J. D. Adams Company now causes, and has caused in the past, its products, when sold, leased, and/or licensed, to be shipped from its place of business in the State of Colorado to purchasers, lessees and/or licensees thereof in other states, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that actual and potential competition has been lessened, restricted and restrained by reason of the practices hereinafter alleged, respondent J. D. Adams Company has been and is now engaged in competition with firms, partnerships, and corporations engaged in the manufacture and distribution of truss fabricating equipment, the manufacture and sale of truss connecting plates, and the design and sale of engineering services.

PAR. 5. In the course and conduct of its business as described above, respondent J. D. Adams Company has offered, entered into and enforced agreements with purchasers, lessees and/or licensees of its truss fabricating equipment which require such purchasers, lessees and/or licensees, as a condition to the purchase, lease or license of truss fabricating equipment from said respondent, to purchase truss connecting plates and/or engineering services from said respondent.

PAR. 6. The effect of the aforesaid agreements has been and may be to substantially lessen competition in the manufacture and sale of truss connecting plates and the design and sale of engineering services.

PAR. 7. The acts, practices and methods of competition alleged herein constitute tying agreements or practices by respondent in violation of Section 3 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

PAR. 8. The acts, practices and methods of competition alleged herein constitute unfair methods of competition or unfair acts or practices by respondent in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent J.D. Adams Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 4045 Sinton Rd., P.O. Box 7462, Colorado Springs, Colo.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

For purposes of this order, the folloiwng definitions shall apply:

A. The term "respondent" refers to J. D. Adams Company, a corporation, and its subsidiaries, affiliates, successors, assigns, officers, agents, representatives and employees.

B. The term "truss fabricating equipment" refers to all machinery and equipment sold, leased, or licensed by respondent to be used in the assembly, production and construction of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

C. The term "truss connecting plates" refers to all metal plates bearing any number of nails or other sharp devices used to permanently connect the joints of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

D. The term "engineering services" refers to design specification services provided by respondent in connection with the assembly, production and construction of wood roof trusses, and the selection and designation of truss connecting plates deemed necessary for the proper support of said trusses.

II

It is ordered, That respondent, directly or indirectly through any corporate or other device, in connection with the sale, lease or license of truss fabricating equipment, truss connecting plates and/or engineering services in the United States shall, within thirty (30) days after entry of this order, cease and desist from:

1. Offering, entering into or enforcing any agreement or provision of any agreement, express or implied, which in any way requires or obligates any purchaser, lessee or licensee of respondent's truss fabricating equipment, as a condition to the execution or continuation of a purchase, lease or license agreement with respect to such equipment, to purchase or agree to purchase all or any part of such purchaser's, lessee's or licensee's requirements of truss connecting plates and/or engineering services from respondent or from any source designated by respondent.

2. Offering, allowing or granting a price discount, rental or royalty reduction, rebate, or other valuable consideration on or with respect to the sale, lease or license of respondent's truss fabricating equipment which is in any way based upon purchases of truss connecting plates and/or engineering services from respondent or from any source designated by respondent.

3. Requiring any of its purchasers, lessees or licensees of truss fabricating equipment to purchase truss connecting plates and any other products from respondent or from any source designated by respondent.

III

It is further ordered, That respondent shall:

1. Within thirty (30) days after entry of this order, mail a letter on its stationery, signed by the officers of the respondent and enclosing a copy of this order, to all of its purchasers, lessees, and/or licensees of truss fabricating equipment who have purchased truss connecting plates from it during the twenty-four (24) months preceding entry of

this order which informs each such purchaser, lessee or licensee of the prohibitive terms of this order.

2. Notify, during the the five (5) year period after entry of this order, each new prospective purchaser, lessee or licensee of its truss fabricating equipment (excluding replacement parts) of the prohibitive terms of this order on its first written proposal to each such new prospective purchaser, lessee or licensee.

3. Within ten (10) days after entry of this order, provide a copy of this order to each of its salesmen, sales agents and sales representatives.

4. Within thirty (30) days after entry of this order, and continuing thereafter, make available its manuals concerning its standard wood roof truss designs, including updated standard wood roof truss designs, to any truss fabricator desiring such manuals; nothing contained in this order shall prohibit respondent from charging a reasonable fee for such manuals.

5. Within sixty (60) days after entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

6. Notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IN THE MATTER OF

WEAVER AIRLINE PERSONNEL SCHOOL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2638. Complaint, Feb. 13, 1975 - Decision, Feb. 13, 1975

Consent order requiring a Kansas City, Mo., airline school and its parent corporation located in Los Angeles, Calif., among other things to cease misrepresenting the degree of industry demand for its graduates, its selectivity in accepting enrollees, the availability of jobs, and the nature and effectiveness of its placement service. Further, the order requires pro-rata refunds be paid to recent eligible enrollees.

Appearances

For the Commission: *Keith Q. Hayes* and *Charles B. Wesonig.*

For the respondents: *Roger S. Fine, Cahill, Gordon & Reindel,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Weaver Airline Personnel School, Inc. and General Educational Services Corporation, corporations, sometimes hereinafter jointly referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Weaver Airline Personnel School, Inc., (hereinafter sometimes referred to as respondent Weaver), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri. It maintains its principal office and place of business at 3521 Broadway, in the city of Kansas City, State of Missouri. Respondent Weaver is a wholly-owned subsidiary of respondent General Educational Services Corporation. Respondent Weaver is now, and for some time last past has been, engaged in the formulation, development, offering for sale, sale and distribution of course(s) of instruction intended to prepare graduates thereof for entry level employment in the airline industry as reservation agents, communication agents, ticket agents, operations (transportation, ramp) agents and air freight sales agents.

Respondent General Educational Services Corporation, (hereinafter sometimes referred to as respondent GES), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. It maintains its principal office and place of business at 1880 Century Park East, in the city of Los Angeles, State of California. Respondent GES owns all of the stock of respondent Weaver Airline Personnel School, Inc. It dominates and controls the business acts and practices of respondent Weaver Airline Personnel School, Inc., and further accepts the pecuniary and other benefits flowing from the acts and practices hereinafter set forth of respondent Weaver Airline Personnel School, Inc.

PAR. 2. Respondents, in the course and conduct of their business as aforesaid, have caused respondent Weaver's airline training course(s) of instruction to be advertised, sold and financed to purchasers thereof located in the various States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said airline training course(s), in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of its aforesaid business, respondent Weaver, for the purpose of obtaining leads to prospective purchasers and inducing the purchase of its course(s) of instruction, related products, and services by members of the public, has made numerous statements and representations in advertisements inserted in newspapers, magazines and in direct mail pieces of general interstate circulation, without disclosing that persons who respond to such advertisements will be called upon by respondent Weaver's salesmen. Typical and illustrative of the foregoing, but not all inclusive thereof, are the following:

AIRLINES NEED
Young Men and Women

For glamorous public contact positions as Reservationist, Passenger or Ticket Agent, Communicationist * * *. For full information phone ———, or mail coupon to ———.

* * * * * * *

AIRLINES GIRLS HAVE
EXCITING FUTURES

START YOUR
AIRLINE
CAREER
THE WEAVER WAY

Jet-age expansion is creating many new positions with the airlines. Young women (and men, too.) are needed in reservations, communications ticketing and passenger service* * *.

* * *If you are a high school graduate, send coupon today to learn if you can qualify.

* * * * * * *

let your future soar!

GET INTO AN AIRLINE CAREER!

* * * * * * *

This coupon brings you free facts about Weaver Airline training. . . .

* * * * * * *

COMMERCIAL AIRLINES URGENTLY NEED YOUNG MEN AND WOMEN BETWEEN THE AGES OF 17 AND 28.

* * * * * * *

PAR. 4. Through the use of the statements and representations set forth above, and others similar thereto, but not specifically set out herein, and through other statements made orally and in writing by respondent Weaver, its employees, agents and representatives, respondent has represented, directly or by implication, to the purchasing public that:

1. Airlines hire almost all of respondent Weaver's students while they are attending residence training or upon completion of the course.

2. Airlines need substantial numbers of new men and women employees in 1970, 1971 and 1972.

3. Respondent Weaver is selective and limits the number of prospective purchasers it will enroll in its course(s) in airline training.

4. Most of respondent Weaver's students will be interviewed by various airlines during residence training.

5. Respondent Weaver operates an effective placement service which is successful in obtaining employment in the airline industry for most of the students who attend residence training or complete its airline training course(s).

6. Persons graduating from respondent Weaver's course(s) in airline training can usually obtain employment in the airline industry in the geographic area of their choice.

PAR. 5. In truth and in fact:

1. Most of the students who attended residence training, or completed respondent Weaver's course(s) in airline training in 1970, 1971 and 1972, were not employed by the airline industry.

2. During the calendar years of 1970, 1971 and 1972, the airline industry did not need substantial numbers of new men and women.

3. Respondent Weaver is not selective and does not limit the number of prospective purchasers that its salesmen can enroll in its course(s) of airline training.

4. Few, if any, of respondent Weaver's students are interviewed by an airline while attending residence training.

5. Respondent Weaver's placement service was unable to obtain employment in the airline industry for most of respondent Weaver's students in 1970, 1971 and 1972.

6. Most of respondent Weaver's graduates have been unable to obtain employment in the airline industry in the geographic area of their choice in 1970, 1971 and 1972.

Therefore, the statements and representations, as set forth in Paragraph Four hereof, were and are unfair, false, misleading and deceptive.

PAR. 6. Respondent Weaver has offered for sale, course(s) of instruction intended to prepare graduates thereof for entry level employment in the airline industry, without disclosing in advertising or through its sales representatives:

1. That most persons enrolling in respondent Weaver's course(s) of airline instruction do not complete such course(s) of instruction.

2. That most persons who do complete respondent Weaver's course(s) in airline training do not obtain employment in the airline industry.

3. The number of its graduates who were able to obtain the employment for which they were trained, in relation to the number of persons enrolled, and the number of persons graduated for such period(s) of time.

4. That most airlines train those persons whom they employ, and the training offered by respondent Weaver is not necessary to obtain entry level employment in the airline industry, or any other industry. Knowledge of such facts would indicate the possibility of securing future employment as a result of enrolling in respondent Weaver's course(s) of airline training. Thus, respondent Weaver has failed to disclose material facts, which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such course(s) of instruction.

Therefore, The aforesaid acts and practices were and are false, misleading and deceptive or unfair acts and practices.

PAR. 7. Respondent Weaver has used the aforesaid false, misleading, deceptive or unfair acts and practices which, under all of the facts and circumstances, respondents should have known were false, misleading, deceptive and unfair, to induce persons to pay or to contract to pay substantial sums of money for respondent Weaver's course(s) of instruction which, in connection with said purchasers' future employment and careers, were, and are, without substantial value to many enrollees of said courses. Respondents have received the said sums and have failed to offer refunds, or refund such sums, to a substantial number of enrollees and participants in such courses who were unable to secure employment in the positions and fields for which they have been purportedly trained by respondents.

The use by respondent Weaver of the aforesaid acts and practices and respondents' continued retention of said sums of money, as aforesaid, were, are are, unfair acts and practices.

PAR. 8. The use by respondents of false, misleading, deceptive and unfair statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, has had a capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and complete, and into the purchase of said respondents' course(s) in airline training and related products and services, by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Weaver Airline Personnel School, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 3521 Broadway, Kansas City, Mo.

Respondent General Educational Services Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 1880 Century Park E., Los Angeles, Calif.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Weaver Airline Personnel School, Inc., a corporation, and respondent General Educational Services Corporation, a corporation, their successors and assigns, and their officers, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with advertising, offering for sale, sale or distribution of courses of study, training, or instruction in the field of airline training, do forthwith cease and desist from:

1. Representing, orally, in writing, or in any other manner, directly or by implication, that:

(a) The airline industry has employed or will employ enrollees or graduates of any such course(s), without furnishing the information specified in Paragraph 5(b)(3) of this order.

(b) The airline industry needs men and/or women, without furnishing the information specified in Paragraph 5(b)(3) of this order.

(c) Respondents are selective or limit the number of prospective purchasers whom they will enroll in any such course(s).

(d) Representatives of the airline industry come to respondents' place of business, or any other place, to hire graduates of any such course(s) of instruction, without furnishing the information specified in Paragraph 5(b)(3) of this order.

(e) Any placement service has or will assist enrollees or graduates of any such course(s) in any manner, without furnishing the information specified in Paragraph 5(b)(3) of this order.

(f) Persons who enroll in any such course(s) of instruction offered by respondents can obtain employment in or near any geographic location.

2. Failing to disclose, clearly and conspicuously, in advertisements for any such course(s) that inquirers will be visited by sales representatives, unless consent to such visits is first obtained by mail or telephone.

3. Using, orally, in writing, or in any other manner, at any time, statistical data or numerical estimates, derived from any source whatsoever, respecting present or future occupational demand or the growth of employment in the airline industry, without furnishing the information specified in Paragraph 5(b)(1), (2), (3) of this order.

4. Failing to keep adequate records which may be inspected by the Commission staff members upon reasonable notice:

(a) Which disclose the facts upon which any placement statistics or claims or other representations of the type described in Paragraph 5(b)(1), (2), (3) of this order are based, and

(b) From which the validity of any placement statistics described in Paragraph 5(b)(3) of this order can be determined,

for so long as such statistics, claims or other representations are disseminated, made or authorized by respondents, or are required to be disclosed hereunder and for a further period of three (3) years after respondents' termination of dissemination, use, authorization or disclosure of such statistics, claims or representations, (whichever period is the longer).

5. Failing to send by certified mail, return receipt requested, to each person that shall contract for the sale of any such course of instruction, a notice, in a form approved by the Commission which shall disclose the following information and none other:

(a) The title "IMPORTANT INFORMATION" printed in bold face type across the top of the form.

(b) A paragraph reciting the following affirmative disclosures:

(1) A statement disclosing the total number of students who have enrolled in each such course of instruction offered by respondents for each of the three preceding calendar years.

(2) A statement disclosing the total number of students who have graduated from each such course of instruction offered by respondents for each of the three preceding calendar years.

(3) A statement disclosing the total number of students who have obtained employment through respondents' placement service each year for the three preceding calendar years in the airline industry.

(4) A statement which shall read as follows:

> Most airlines train those persons whom they employ and the training offered by proprietary vocational training schools, which are not affiliated with the airlines, is not necessary to obtain entry level employment with such airlines. Where other factors are equal, airlines may give preference in employment to persons having such training.

(5) An explanation of the cancellation procedure provided in this order, namely, that any contract or other agreement may be cancelled within three (3) days after receipt by the customer, via the U.S. mails, of this notice.

(6) Said notice shall contain a detachable form which the person may use as a notice of cancellation, which indicates the proper address for accomplishing any such cancellation.

(7) The said notice shall be sent by respondents no sooner than the next day after the person shall have executed a contract for the sale of any such course of instruction.

6. Contracting for any sale of any such course of instruction in the form of a sales contract or other agreement which shall become binding

prior to the end of the third day after the day of receipt by the customer of the form of notice provided in Paragraph 5 of this order.

7. *It is further ordered*, That respondents, in connection with the sale or offering for sale of any such course, training, or instruction:

(a) Inform orally all prospective purchasers to whom solicitations are made, and provide, in writing, in all applications and contracts, in at least ten-point bold type, that the application or contract may be cancelled for any reason by notification to respondents, in writing, within three (3) days from the date of receipt of the form of notice provided in Paragraph 5 of this order.

(b) Refund immediately all monies to all purchasers who have requested cancellation of the application or contract within three (3) days from the date of receipt of the form of notice provided in Paragraph 5 of this order.

8. *It is further ordered*, That:

(a) Respondents herein deliver a copy of the decision and order in this matter to each of their present and future employees, salesmen, agents, solicitors, independent contractors, or to any other person, who promotes, offers for sale, sells or distributes any course of instruction included in this order.

(b) Respondents herein provide each person so described in Paragraph 8(a) above with a form, returnable to the respondents, clearly stating his intention to be bound by and to conform his business practices to the requirements of this order; retain said statement during the period said person is so engaged; and make said statement available to the Commission's staff for inspection and copying purposes upon request.

(c) Respondents herein inform each person so described in Paragraph 8(a) above that the respondents will not use or engage or will terminate the use or engagement of any such party, unless such party agrees to and does file notice with the respondents that he will be bound by provisions contained in this order.

(d) If such party as described in Paragraph 8(a) above will not agree to so file the notice set forth in Paragraph 8(b) above with the respondents and be bound by the provisions of the order, the respondents will not use or engage or continue the use or engagement of such party to promote, offer for sale, sell or distribute any course of instruction included in this order.

(e) Respondents herein inform the persons described in Paragraph 8(a) above that the respondents are obligated by this order to discontinue dealing with, or to terminate the use or engagement of persons who continue on their own the deceptive acts or practices prohibited by this order.

(f) Respondents herein institute a program of continuing surveillance adequate to reveal whether the business practices of each said person described in Paragraph 8(a) above conform to the requirements of this order.

(g) Respondents herein discontinue dealing with or terminate the use or engagement of any person described in Paragraph 8(a) above, as revealed by the aforesaid program of surveillance, who continues on his own any act or practice prohibited by this order.

9. *It is further ordered*, That respondents shall forthwith distribute a copy of this order to each of their operating divisions or subsidiaries in the field of airline training or any other field.

10. *It is further ordered*, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in their corporate status, such as dissolution, assignment, or sale, resulting in the emergence of successor corporation(s), the creation or dissolution of which may affect compliance obligations arising out of this order.

11. *It is further ordered*, That respondent Weaver Airline Personnel School, Inc. shall notify in writing, at the last known address, within thirty (30) days after the date this order becomes final, all students who enrolled in any of the courses offered by respondent Weaver Airline Personnel School, Inc. on or after Jan. 1, 1972, and who paid in full for such course on or before the date this order becomes final, by certified mail, return receipt requested of their right to present claims for restitution according to the following terms and conditions:

Students shall be informed that in order to be entitled to restitution they must submit to respondent Weaver Airline Personnel School, Inc. a notarized affidavit containing details of the following affirmations:

(a) That the student enrolled in any course(s) of instruction offered by respondent Weaver Airline Personnel School, Inc. on or after Jan. 1, 1972.

(b) That the student paid the full amount required by respondents for tuition for any course(s) of instruction offered by respondent Weaver Airline Personnel School, Inc. on or after Jan. 1, 1972.

(c) That the student attempted to procure employment in the field for which he or she took training from respondent Weaver Airline Personnel School, Inc. and was unsuccessful in obtaining employment within six months after completion or termination by the student of his or her course(s).

(d) That the student agrees that in consideration of his receipt of a pro-rata share of cash restitution as provided for in this order such student releases respondents from any and all further claims such student might have, whether known or unknown, with respect to or arising out of his or her agreement with or course of study at Weaver Airline Personnel School, Inc.

Failure to seek or obtain restitution pursuant to this order shall not preclude any student from pursuing any other remedy under law.

Provided, however, That no such notice need be sent to any such students with respect to whom respondent Weaver Airline Personnel School, Inc. certifies to the staff of the Commission that it placed in employment in the airline or travel-related field together with such details of such placements as the staff may reasonably require.

Respondent Weaver Airline Personnel School, Inc. shall make restitution to any student submitting a sworn affidavit complying with the provisions of Sections (a) through (d) of this paragraph, pursuant to the following procedure:

(1) Students seeking restitution must submit proper affidavits within seventeen (17) months after receiving proper notice as to their right to such restitution.

(2) Respondent Weaver Airline Personnel School, Inc. shall make pro-rata payments, in amounts to each student no greater than that student's total tuition payment, to each student seeking and qualifying for restitution under the terms of this order. *Provided, however*, That the total sum to be paid in restitution under Paragraph 11 of this order shall not be greater than two hundred and forty-nine thousand dollars ($249,000). Said payments shall be made no later than thirty (30) days after the final date established for submission of student requests for restitution.

Provided further, That in the event the amount required to be paid in restitution to those students who enrolled on or after Jan. 1, 1972 is less than two hundred and forty-nine thousand dollars ($249,000), respondent Weaver Airline Personnel School, Inc. shall notify all students who enrolled on or after Jan. 1, 1971, but not later than Dec. 31, 1971, and who paid in full, of their right to restitution, in the same manner as provided in this Paragraph for those students who enrolled on or after Jan. 1, 1972, except that such notice shall be sent within thirty (30) days after the final date upon which the initial restitution payments shall be due. Said students seeking restitution must then submit affidavits, as provided in Sections (a) through (d) of this paragraph (modified as to date of enrollment in subparagraph (a)) within ninety (90) days after receipt of said notice. Weaver Airline Personnel School, Inc. shall then make pro-rata refunds, in the same manner as provided in Section (2) of this paragraph. *Provided, however*, That the total sum to be paid under this paragraph shall not exceed two hundred and forty-nine thousand dollars ($249,000) when combined with the total restitution paid to those students who enrolled on or after Jan. 1, 1972. In the event the amount required to be paid still does not exceed two hundred forty-nine thousand dollars ($249,000) then the same procedure set forth in this paragraph shall be followed with respect to all students who enrolled on or after Jan. 1, 1970 but not later than Dec. 31, 1970 and who paid in full.

12. *It is further ordered*, That all sums collected or received by Weaver Airline Personnel School, Inc. on or after May 20, 1974 on obligations of students shall be distributed as follows:

1. The first three hundred thousand dollars ($300,000) so collected or received shall be the property of respondent Weaver Airline Personnel School, Inc.

2. All sums so collected in excess of three hundred thousand dollars ($300,000) shall be kept in a special escrow account (said excess sums are hereinafter referred to as the "Escrow Funds"). Respondent Weaver Airline Personnel School, Inc. shall notify in writing, at the last known address, twelve (12) months after the date this order becomes final, all students who enrolled in any of the courses offered by respondent Weaver Airline Personnel School, Inc. and whose accounts receivable are outstanding, in whole or in part, as of the date this order becomes final, by ordinary mail, of their right to present claims for restitution according to the following terms and conditions:

(a) Respondent Weaver Airline Personnel School, Inc. shall make restitution to any student submitting a notarized affidavit containing details of the following affirmations:

(1) That the student enrolled in any course(s) of instruction offered by respondent Weaver Airline Personnel School, Inc.

(2) That the student paid the full amount required by respondents for tuition for any course(s) of instruction offered by respondent Weaver Airline Personnel School, Inc. on or after the date this order becomes final. (Respondents shall, in the notice to said students of their right to restitution, set forth the date this order becomes final.)

(3) That the student attempted to procure employment in the field for which he or she took training from respondent Weaver Airline Personnel School, Inc. and was unsuccessful in obtaining employment within six (6) months after completion or termination by the student of his or her course(s), or as of the date the student files his or her affidavit requesting restitution pursuant to this order, whichever date is earlier.

(4) That the student agrees that in consideration of his receipt of a pro-rata share of cash restitution as provided for in this order such student releases respondents from any and all further claims such student might have, whether known or unknown, with respect to or

arising out of his agreement with or course of study at Weaver Airline Personnel School, Inc.

(b) Students seeking restitution must submit proper affidavits within six (6) months after receiving proper notice as to their right to such restitution.

(c) Respondent Weaver Airline Personnel School, Inc. shall then make pro-rata payments, in amounts to each student no greater than that student's total tuition payment, to each student seeking and qualifying for restitution under the terms of this order. *Provided, however,* That the total sum to be paid in restitution under Paragraph 12 of this order shall not be greater than the principal amount of the escrow funds as of the final date by which such students are required to submit requests for restitution under this paragraph. Said payments shall be made no later than thirty (30) days after the final date established for submission of student requests for restitution under this Paragraph.

(d) Sums collected after the final date established for submission of student requests for restitution under this Paragraph, and any interest earned on the escrow funds, shall be the property of respondent Weaver Airline Personnel School, Inc.

Provided, however, That nothing in this order shall be deemed as abrogating any defense any student may have with respect to any claim by respondents for all or part of any unpaid tuition fees allegedly due or owing from any student enrolled in any course(s) of instruction offered by respondent Weaver Airline Personnel School, Inc.

Provided further, That in the event respondents negotiate or otherwise transfer to any third party, during the period ending with the last date by which students may seek restitution under this paragraph of this order, any of the accounts receivable representing tuition payments allegedly due and owing from enrollees in any course(s) of instruction offered by respondent Weaver Airline Personnel School, Inc., its successors or assigns, said transfer or negotiation shall be accompanied by an explicit written agreement that the transferee or purchaser of said account receivable shall be subject to the terms and conditions of Paragraph 12 of this order.

13. *It is further ordered,* That the obligation of respondent Weaver Airline Personnel School, Inc. to make restitution as set forth in this order shall be and hereby is guaranteed by respondent General Educational Services Corporation.

14. *It is further ordered,* That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order.

IN THE MATTER OF

J. M. SANDERS T/A J. M. SANDERS JEWELRY COMPANY

ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 8977. Complaint, July 1, 1974 - Decision, Feb. 18, 1975

Consent order requiring a Chattanooga, Tenn., retailer of jewelry and small appliances, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Edward J. Carnot, W. Roland Campbell,* and *Barbara S. Schanker.*

For the respondent: *Glen Copeland, Roberts, Weill, Ellis & Copeland,* Chattanooga, Tenn.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that J. M. Sanders, an individual trading and doing business as J. M. Sanders Jewelry Company, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent J. M. Sanders is an individual trading and doing business as J. M. Sanders Jewelry Company, under and by virtue of the laws of the State of Tennessee, with his principal office and place of business located at 1431 Market St., in the city of Chattanooga, State of Tennessee.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of jewelry, small appliances, and other types of merchandise to the public.

PAR. 3. In the ordinary course and conduct of his business as aforesaid, respondent regularly extends consumer credit and arranges for the extension of consumer credit, as "consumer credit" and "arrange for the extension of credit" are defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of his business as aforesaid, and in connection with his credit sales, as "credit sale" is defined in Regulation Z, respondent has caused and is causing his customers to enter into contracts for the sale of respondent's goods. On these contracts, hereinafter referred to as "the contract," respondent provides certain consumer credit cost information. Respondent does not provide these customers with any other consumer credit cost disclosures.

By and through use of the contract, in many instances, respondent:

1. Fails to use the term "cash price" to describe the price at which respondent offers, in the regular course of business, to sell for cash the property or services which are the subject of the credit sale, as required by Section 226.8(c)(1) of Regulation Z.

2. Fails to disclose the downpayment in money made in connection with the credit sale, and to describe that amount as the "cash downpayment," as required by Section 226.8(c)(2) of Regulation Z.

3. Fails to disclose the downpayment in property made in connection with the credit sale, and to describe that amount as the "trade-in," as required by Section 226.8(c)(2) of Regulation Z.

4. Fails to disclose the sum of the "cash downpayment" and the "trade-in," and to describe that sum as the "total downpayment," as required by Section 226.8(c)(2) of Regulation Z.

5. Fails to disclose the difference between the cash price and the total downpayment, and to describe that difference as the "unpaid balance of cash price," as required by Section 226.8(c)(3) of Regulation Z.

6. Fails to disclose the sum of the unpaid balance of cash price and all other charges which are included in the amount financed but which are not part of the finance charge, and to describe that sum as the "unpaid balance," as required by Section 226.8(c)(5) of Regulation Z.

7. Fails to disclose the "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

8. Fails to use the term "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.

9. Fails to disclose accurately the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

10. Fails to disclose the "annual percentage rate" accurately to the

nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

11. Fails to disclose the number of payments scheduled to repay the indebtedness as required by Section 226.8(b)(3) of Regulation Z.

12. Fails to disclose accurately the sum of the payments scheduled to repay the indebtedness, and to describe that sum as the "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

13. Sets forth a ten percent (10%) national and railroad collecting fee and other percentage fees which tend to mislead and confuse the customer about the actual cost of credit extended, in violation of Section 226.6(c) of Regulation Z.

PAR. 5. In the ordinary course of business as aforesaid, respondent causes to be published advertisement of goods, as "advertisement" is defined in Regulation Z. These advertisements aid, promote, or assist directly or indirectly extensions of consumer credit in connection with the sale of these goods. By and through the use of the advertisements, respondent:

States that no downpayment is required, in connection with a consumer credit transaction, without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

(i) The cash price;

(ii) The amount of the downpayment required or that no downpayment is required, as applicable;

(iii) The number, amount, and due dates or period of payment schedule to repay the indebtedness if the credit is extended;

(iv) The amount of the finance charge expressed as an annual percentage rate; and

(v) The deferred payment price.

PAR. 6. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions Regulation Z constitute violations of that Act and, pursuant to Section 108(c) thereof, respondent has thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY WILLIAM K. JACKSON, ADMINISTRATIVE LAW JUDGE

DECEMBER 31, 1974

Preliminary Statement

The Federal Trade Commission, on July 1, 1974, issued its complaint in this proceeding charging respondent J. M. Sanders, an individual trading and doing business as J. M. Sanders Jewelry Company, hereinafter referred to as the respondent, with failure to comply with the provisions of Regulation Z,[1] the implementing regulation of the Truth in Lending Act,[2] duly promulgated by the Board of Governors of the Federal Reserve System and, pursuant to Section 108(c) of said Act (15 U.S.C. § 1607(c)), with having violated the Federal Trade Commission Act.[3] Specifically, respondent is charged with 13 specific violations[4] of Section 226.8 of Regulation Z (12 C.F.R. § 226.8) in connection with "credit sale" contracts in the sale and distribution of jewelry, small appliances, and other types of merchandise by him to the public by failing to disclose certain consumer credit cost information on said contracts. In addition, the complaint alleges that certain advertisements which aid, promote or assist, directly or indirectly, extension of consumer credit in connection with the sale of respondent's goods, fail to set forth certain prescribed information required by Sections 226.8 and 226.10(d)(2) of Regulation Z.

After being served on July 17, 1974 with the complaint, respondent appeared by counsel and filed, on Aug. 19, 1974, his answer to the complaint denying, in substance, the allegations of the complaint, but admitting certain jurisdictional facts. Thereafter, pursuant to order dated Aug. 20, 1974, the parties were directed to exchange lists of witnesses, documents and other physical exhibits and to complete certain other pretrial matters.

Pursuant to order dated Aug. 30, 1974, evidentiary hearings in this matter were held in Chattanooga, Tenn., on Oct. 2 and 3, 1974, during which complaint counsel adduced the testimony of three of respondent's customers (Halter, Sticher and Gibson), one of respondent's former employees (Tuder) and Mrs. Barbara Schanker, a Consumer Protection Specialist of the Federal Trade Commission's Atlanta Regional Office, to explain the Truth in Lending Act's prescribed computations. Respondent Sanders was the only witness called in his defense. Complaint counsel submitted 75 exhibits and respondent had no exhibits. The record was closed on Oct. 3, 1974, and the parties, at the undersigned's direction, thereafter filed proposed findings of fact, conclusions of law, and briefs.

Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of this initial decision, are hereby denied.

This proceeding is before the undersigned upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions of law, and briefs filed by counsel supporting the complaint and by counsel for respondent. The proposed findings of fact, conclusions of law, and briefs in support thereof submitted by the parties have been carefully considered, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial matter.

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[1] 12 C.F.R. § 226, *et seq.*; 15 U.S.C. p. 615.

[2] Truth in Lending Act, § 101, *et seq.*; 15 U.S.C. §§ 1601-1665.

[3] 15 U.S.C. §§ 41, 45.

[4] See Findings 7-20, *infra*.

Having heard and observed the witnesses, and after having carefully reviewed the entire record in this proceeding together with the proposed findings, conclusions and briefs submitted by the parties, as well as replies, the undersigned makes the following:

FINDINGS OF FACT

1. Respondent J. M. Sanders is an individual trading and doing business as J. M. Sanders Jewelry Company, under and by virtue of the laws of the State of Tennessee, with his principal office and place of business located at 1431 Market St., in the city of Chattanooga, State of Tennessee (Answer).

2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of jewelry, small appliances, and other types of merchandise to the public (Answer) since 1959 (Sanders 212).[5] During 1971, respondent's gross sales reached nearly $400,000 (CX 63C).

3. In the ordinary course and conduct of his business as aforesaid, respondent regularly extends consumer credit and arranges for the extension of consumer credit, as "consumer credit" and "arrange for the extension of credit" are defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System (Answer).

4. Miss Ruby Tuder, an employee who had worked in respondent's jewelry store and had accompanied him also on "road jobs" had worked for individual respondent Sanders during the past ten (10) years ending on June 14, 1974. She had been employed at first only as a sales clerk and then later as both sales clerk and bookkeeper (Tuder 64-65; Sanders 189). According to Miss Tuder, respondent's *modus operandi* is as follows:

Sanders had placed the store's advertisement (CX 55-CX 59) and had dictated the terminology contained therein (Tuder 78-79); he had ordered the matches (CX 51A-B; CX 52A-B) and directed the terminology on these match covers (Tuder 79-80) and had ordered pens (CX 61; CX 62) and had directed the terminology to be engraved on these pens (Tuder 80-82). These matches and pens, respectively, have been used for advertising purposes by J. M. Sanders Jewelry Company for dissemination to the public since 1968 until at least through June 14, 1974 (Tuder 80, 81, 84, 94).

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[5] References to the record are made in parentheses and certain abbreviations as hereafter set forth are used:

CX - Commission's Exhibit

RX - Respondent's Exhibit

RAR - Respondent's answer to complaint counsel's request for admissions

The transcript of the testimony is referred to with either the last name of the witness and the page number or numbers upon which the testimony appears or with the abbreviation Tr. and the page.

Respondent consummated sales both at his store and "on the road" (Tuder 68-70). To record these transactions, whether they be cash or credit sales, respondent has, since 1968, used a "folio" (CX 1) on which individual respondent Sanders directed the terminology (Tuder 80). In the latter part of 1973, respondent began using both CX 65 and the folio (CX 1) to record retail installment contracts (Tuder 107; RAR 73). Both the folio (CX 1) and the retail installment contract (CX 65) have a space for the customer's signature.

A customer making a credit purchase from late 1973 on was supposed to receive a copy of both the folio and the retail installment contract (Tuder 82, 108). In all instances, the customer was asked to sign the folio first (Tuder 82) because respondent Sanders felt that said folio was a contract which would be enforceable in court in case of the customer's default (Tuder 69).

Respondent, when making sales, would accept trade-ins, cash downpayments or no downpayments (Tuder 68).

On installment sales to railroad employees, J. M. Sanders would charge the purchaser a 10 percent collecting fee, *i.e.*, the amount the railroads charge respondent Sanders for withholding from the railroad employees' pay checks money to pay J. M. Sanders for their purchases. On sales and credit balances over $225, respondent made an additional 1 1/2 percent monthly finance charge (Tuder 83-85; Schanker 148).

J. M. Sanders also sold merchandise to railroad employees who lived and worked outside of the Chattanooga area. These sales were referred to as "road jobs" (Tuder 69-70). In installment sales on "road jobs," the purchaser received the merchandise and Sanders' calling card, on the back of which Sanders had computed the cost to the purchaser, including the interest, finance charges and tax. Sanders would remove from the sold merchandise the identification tag on which were inscribed the stock number and the cost, insert said tag in a brown envelope and mark on the outside of said brown envelope the same information he had written on the calling card he had issued to the purchaser, including the name and address of the customer. After respondent returned from a "road trip," the customer generally would be mailed a folio as evidence of his indebtedness (Tuder 108). Within the last year, however, instead of subsequently mailing only a folio, as was respondent's practice for similar sales more than a year ago (Tuder

108), he would mail a folio and a retail installment contract (CX 65) to be signed (Tuder 90-91), or in some cases these documents were signed in blank on the road (Tuder 92). In any event, with respect to sales "on the road" made within the last year, the customer did not receive the required cost of credit disclosures either prior to or at the time the sale was consummated, as required by 12 C.F.R. §226.8(a) (15 U.S.C.A. 1638(b)); *Ratner* v. *Chemical Bank New York Trust Co.*, CCH Consumer Credit Guide, ¶ 99.456, 329 F.Supp. 270 (S.D.N.Y. 1971).

In order to collect for retail installment purchases of railroad employees, Sanders only needed the employee's social security number and a signed railroad payroll deduction authorization. The customers' signature on contracts and folios was therefore not vital (Tuder 91-92).

For credit sales at the store, individual respondent Sanders had instructed his employees on how to compute the various finance charges and applicable taxes and how to fill in the folios and contracts (Tuder 119-120).

Customers who made purchases from respondent on credit and paid their obligations directly to Sanders were not charged the 10 percent railroad deduction fee and were only charged a 1 1/2 percent monthly finance charge (Tuder 81-85).

5. Subsequent to July 1, 1969, respondent in the ordinary course and conduct of his business and in connection with his credit sales, as "credit sale" is defined in Regulation Z (§ 226.2(n), 12 C.F.R. §226.2(n)), has caused and is causing customers to enter into contracts for the sale of respondent's goods (CX 2-CX 43, CX 45, CX 69-CX 71, CX 79-CX 81, CX 84-CX 87). On these contracts, hereinafter referred to as "the contract," respondent provides certain consumer credit cost information (see CX 1). Prior to 1973, respondent did not provide the customers with any other consumer credit cost disclosures (Tuder 107-108).

6. Respondent used the folio (CX 1) to record both credit and cash transactions (Tuder 80; RAR 1, 2, 3, 4, 5, 6, 7). The folio has been in use since 1968 through at least June 14, 1974 (Tuder 80).

7. Respondent fails to use the term "cash price" to describe on the contract the price at which respondent offers, in the regular course of business, to sell for cash the property or services which are the subject of the credit sale, as required by Section 226.8(c)(1) of Regulation Z (12 C.F.R. §226.8(c)(1)).

Respondent admits to using folios (such as CX 1) subsequent to July 1, 1969, to reflect financial obligations whether they be cash or credit transactions (RAR 1, 2, 3, 4, 5, 6, 7). The use of these folios to record credit transactions is verified by the testimony of respondent's customers (Halter 29-34; Sticher 38-53; Gibson 59-63) and the testimony of a former employee (Tuder 67-70).

An examination of the following exhibits, representing credit transactions, reveals respondent's failure to use the term "cash price": CX 1, CX 2-CX 41, CX 43, CX 45, CX 69-CX 71, CX 79, CX 81, CX 84. See also RAR 8.

8. Respondent fails to disclose on contracts the downpayment in money made in connection with the credit sale, and to describe that amount as the "cash downpayment," as required by Section 226.8(c)(2) of Regulation Z (12 C.F.R. §226.8(c)(2)).

The uncontroverted testimony of respondent's former employee establishes that respondent did accept downpayments (Tuder 68-69). An examination of the exhibits reveals that respondent accepted downpayments but had failed to describe the amounts as "cash downpayments" (CX 10, CX 79, CX 81, CX 84. See also RAR 9).

9. Respondent fails to disclose on contracts the downpayment in property made in connection with the credit sale and to describe that amount as the "trade-in," as required by Section 226.8(c)(2) of Regulation Z (12 C.F.R. §226.8(c)(2)).

Respondent's former employee testified that respondent did accept trade-ins (Tuder 68-69). The fact that respondent accepted trade-ins but had failed to describe the amounts as "trade-ins" is established by examination of the following contracts: CX 1 and CX 2. (See also RAR 10.)

10. Respondent fails to disclose on contracts the sum of the "cash downpayment" and the "trade-in," and to describe that sum as the "total downpayment," as required by Section 226.8(c)(2) of Regulation Z (12 C.F.R. §226.8(c)(2)) (see Findings Nos. 8 and 9; RAR 11; CX 69-CX 71; CX 79-CX 81; CX 84-CX 87).

11. Respondent fails to disclose on contracts the difference between the cash price and the total downpayment, and to describe that difference as the "unpaid balance of cash price," as required by Section 226.8(c)(3) of Regulation Z (12 C.F.R. §226.8(c)(3)).

Witness Schanker explained by referring to CX 81:

> The unpaid balance of the cash price is determined by subtracting from the cash price of $67.50 the down payment of $10.00 and the unpaid balance of cash price would be $57.50 * * * [which] * * * does not appear on the document. (Tr. 166)

Using the same method of calculation as on CX 81, Mrs. Schanker explained that on CX 10 the "unpaid balance of cash price" should be $1,131.36 which is determined by deducting from the cash price of $1,196.00 the downpayment of $64.64. On CX 10, this "unpaid balance of cash price" is not indicated (Schanker 166). Mrs. Schanker further indicated that neither on CX 79 nor on CX 81 does the "unpaid balance of cash price" appear (Tr. 167).

It should also be noted that on none of the folios (CX 1, *et seq.*) is the term "unpaid balance of cash price" used (see also RAR 12).

12. Respondent fails to disclose the sum of the unpaid balance of cash price and all other charges which are included in the amount financed but which are not part of the finance charge, and to describe that sum as the "unpaid balance," as required by Section 226.8(c)(5) of Regulation Z (12 C.F.R. §226.8(c)(5)).

Mrs. Schanker testified that she computed on CX 11 the unpaid balance as follows:

> I added the cash price of $102.95, less the down payment, which is equal to zero, I then added the tax of $6.55 and I came up with an unpaid balance of $109.50. (Tr. 144)

She further testified that respondent's contract does not contain a space entitled "unpaid balance" (Tr. 145).

As to CX 12, Mrs. Schanker testified as follows:

> In this case the cash price is $289.95, to that you're supposed to subtract the downpayment which is zero, and you add the tax of $17.80 and you come up with an unpaid balance of $307.75. This does not appear on the document. (Tr. 145)

An examination of respondent's transactions reveals that not a single contract either shows the "unpaid balance" or has a space provided for the "unpaid balance" (see CX 1, CX 2-CX 5, CX 7-CX 41, CX 43, CX 45, CX 69-CX 71, CX 79, CX 81, CX 84; RAR 13).

13. Respondent fails to disclose on contracts the "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z (12 C.F.R. §226.8(c)(7)).

Mrs. Schanker testified that on CX 35 she computed the "amount financed" as follows:

> The cash price is $375.00, there is no downpayment, I added the tax of $23.64 and came up with an unpaid balance of $398.64. Since there is no prepaid finance charge, the amount financed would be the same as the unpaid balance of $398.64. (Tr. 146)

On CX 36, Mrs. Schanker calculated the "amount financed" as follows:

> * * * the cash price is the sum of the three items purchased of $96.00, $299.95 and $39.95, giving a cash price of $435.90. There is no down payment, then there is a tax of $20.57, giving an unpaid balance of $456.47. Since there is no prepaid finance charge, the amount financed would be the same as the unpaid balance, which is $456.47. (Tr. 147)

An examination of the exhibits reveals that the "unpaid balance" does not appear on CX 1-CX 5, CX 7-CX 41, CX 43, CX 45, CX 69-CX 71, CX 79, CX 81, CX 84. (See also Schanker 146-147; RAR 14.)

14. Respondent fails to use on contracts the term "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z (12 C.F.R. 226.4) to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z (12 C.F.R. §226.8(c)(8)(i)).

Respondent "had an agreement with the railroad in which he could have certain amounts taken out of the railroad people's pay checks, but this amount could not exceed - the total of the purchase, $225; therefore he charged an additional finance charge when the balance was over $225." (Schanker 148; see also Tuder 83-85).

The 10 percent rate expressed in the "National & R.R. 10% Collecting Fee" is a finance charge imposed on respondent's credit customers who are railroad employees and who authorize the railroad to withhold from their pay checks money to pay to J. M. Sanders for their purchases. Said 10 percent, however, is not imposed on cash customers or railroad employees who make their payments directly to J. M. Sanders (Tuder 83-85; Halter 29; Sticher 42, 47; Gibson 49, 63).

Mrs. Schanker testified that on CX 2 she calculated the "finance charge" as follows:

> * * * the finance charge would be the sum of the railroad 10 percent collection fee of $12.60 plus the additional 1-1/2 percent charge of $12.60, giving a finance charge of $25.20 * * * [which] * * * does not appear in the document. (Tr. 149)

An examination of respondent's transactions shows that the term "finance charge" does not appear on CX 2-CX 5, CX 7, CX 8, CX 10, CX 12, CX 26, CX 29, CX 33, CX 35, CX 36, CX 41, CX 43, CX 45, CX 69-CX 71, CX 74, CX 81, CX 84. (See also Schanker 149-150; RAR 15.)

15. Respondent fails to disclose accurately the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price" as required by Section 226.8(c)(8)(ii) of Regulation Z (12 C.F.R. 226.8(c)(8)(ii)).

Mrs. Schanker testified:

> On Commission Exhibit 11, the deferred payment price is the total cost of the item to a person buying on cash so it would be the cash price plus $102.95 plus a tax of $6.55 plus a finance charge of $11.80, giving a deferred payment price of $121.30 * * * [which] * * * does not appear on the document. (Tr. 160-161)

What does appear on CX 11 is $121.40 as the deferred payment price.

As to CX 29, Mrs. Schanker testified:

> * * * the deferred payment price is equal to the cash price of $548.99 with the tax of $27.40 plus a finance charge of $112.91, giving a total - a deferred payment price of $689.30 and this amount does not appear on the document. (Tr. 161)

The deferred payment price on CX 29, however, is marked as $689.20.

It is, therefore, obvious that on CX 11 and CX 29 respondent has failed to *accurately* disclose the deferred payment price.

The following additional exhibits demonstrate that using Mrs. Schanker's calculation, respondent has failed to *accurately* disclose the deferred payment price:

CX	Figures on Contract	Should Read
10	$1464.64	$1596.24
43	78.32	77.32
45	362.27	362.33
82	69.83	79.83
88	90.99	116.23

The term "deferred payment price" does not appear on the 108(c) exhibits: CX 1-CX 41, CX 43, CX 45, CX 69-CX 71, CX 79, CX 81, CX 84 (see also RAR 16).

16. Respondent fails to disclose on contracts the "annual percentage rate" accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z (12 C.F.R. 226.5), as required by Section 226.8(b)(2) of Regulation Z (12 C.F.R. §226.8(b)(2)).

As to CX 11, Mrs. Schanker explained the method of calculating the annual percentage rate as follows:

> In a regular transaction where you calculate an annual percentage rate, you multiply the finance charge times 100 and divide that amount by the amount financed and you come up with a ratio. Then you look in the - Volume I of the Federal Reserve Board tables and you go down to the number of monthly payments and go across to find out what the annual percentage rate is. You match up the ratio that you just computed. On Commission Exhibit 11, the finance charge of $11.80 you multiply by 100 and you divide that amount by $109.50 and you come up with a ratio of * * * 10.78 * * * you go down the table and you have four payments and you come up with an annual percentage rate of 50.75 percent. (Tr. 161-162)

No annual percentage rate, however, is disclosed on CX 11.

On CX 15, Mrs. Schanker calculated the annual percentage rate as follows:

> * * * you multiply the finance charge of $15.70 times 100 and divide that by the amount financed of $141.75 and you come up with a ratio of 11.07 with four monthly payments you have an annual percentage rate of 52 percent. (Tr. 162)

Again, nowhere on CX 15 is there an annual percentage rate disclosed.

Employing Volume I of the Federal Reserve Board's annual percentage rate tables, Mrs. Schanker computed the annual percentage rate of CX 2 to be 76.25 percent (Tr. 162) and that of CX 3 to be 94.75 percent (Tr. 163).

Neither the annual percentage rate nor the term "annual percentage rate" appears on either the aforesaid Commission Exhibits or CX 4-CX 41, CX 43, CX 45, CX 69-CX 71, CX 79, CX 81, CX 84. (See also RAR 17.)

17. Respondent fails to disclose on contracts the number of payments scheduled to repay the indebtedness as required by Section 226.8(b)(3) of Regulation Z (12 C.F.R. §226.8(b)(3)).

After examining respondent's contracts admitted into evidence, Mrs. Schanker testified (Tr. 163-164) that respondent had failed to indicate the number of payments on the following transactions: CX 3, CX 7-CX 9, CX 12, CX 13, CX 15-CX 19, CX 21-CX 28, CX 30-CX 33, CX 37-CX 39, CX 41, CX 42, CX 68.

An examination of CX 5 and CX 10 reveals that respondent had failed to *accurately* disclose the number of payments.

18. Respondent fails to disclose on contracts accurately the sum of the payments scheduled to repay the indebtedness, and to describe that

sum as the "total of payments," as required by Section 226.8(b)(3) of Regulation Z (12 C.F.R. §226.8(b)(3)).

After examining CX 43, Mrs. Schanker explained that respondent has disclosed as "total of payments" $78.32. By, however, simply adding the figures on CX 43, namely: cash price of $60.15 less downpayment (which is zero) plus a tax of $3.62 plus a finance charge of $13.55, the sum is $77.32, which is the actual "total of payments." Respondent, therefore, has failed to accurately disclose the "total of payments" (Schanker 150-151), the error being $1.00.

By using the same method of addition as on CX 43, Mrs. Schanker explained on CX 11 that respondent discloses the total of payments to be $121.40 whereas the figure should be $121.30 (to the sum of the cash price of $102.95 add a tax of $6.55 and a finance charge of $11.80, the sum of which is $121.30) (Schanker 151-152). The error, therefore, is 10 cents.

According to Mrs. Schanker's testimony, the errors appear on the subtotal, the total and the new balance on hold, the latter of which is the new total (Tr. 153).

Mrs. Schanker's calculation of the "total of payments" on CX 6 should be $90.56 (to the cash price of $81.76 add the finance charge of $8.80, which totals $90.56) although respondent's total of payments is listed as $88.15, which is an error of $2.41 (Tr. 154-155).

On CX 10, Mrs. Schanker calculated the "total of payments" to be $1,531.60 while CX 10 lists the total of payments to be $1,400.00, which is an error of $131.60. Mrs. Schanker's calculation on CX 10 is as follows:

From the cash price of $1,196.00 deduct the downpayment of $64.64, which results in an unpaid balance of cash price of $1,131.36, which respondent does not disclose. To the unpaid balance of cash price of $1,131.36 add a tax of $69.60 and the finance charge of $330.64, which results in the total of payments of $1,531.60. Respondent's total number of payments, however, add up to $1,400 (Schanker 155-156).

Using the same method of adding the charges, Mrs. Schanker testified that on CX 29 there is a 10-cent error in that respondent has disclosed the "total of payments" to be $689.20 while they should be $689.30 (Tr. 157-159).

On CX 45, Mrs. Schanker computed the "total of payments" to be $362.33 while respondent's figure on CX 45 is $362.27, an error of 6 cents (Tr. 159-160).

The following documents fail to use the term "total of payments": CX 1-CX 43, CX 45, CX 47, CX 69-CX 71, CX 79-CX 81, CX 84-CX 87 (see also RAR 18).

19. Respondent sets forth on the contract a ten percent (10%)

national and railroad collecting fee and other percentage fees which tend to mislead and confuse the customer about the actual cost of credit extended, in violation of Section 226.6(c) of Regulation Z (12 C.F.R. §226.6(c)).

The "10%" rate expressed in the "National & R.R. 10% Collecting Fee" is computed solely on the cash price and applicable taxes, without consideration of the number of payments scheduled to repay the indebtedness (RAR 22, 44; Copeland 53). Miss Tuder, a former employee of respondent, testified that the 10 percent collecting fee was computed on the total which consists of the sum of the cash price, the tax and service charge. Only after this total, to which was added the 10 percent railroad collecting fee, did respondent deduct any downpayments or trade-ins (Tuder 68-69).

It should also be noted that for other than open end credit, the type respondent extends, one ratio is used to compute the annual percentage rate because there is only one amount to be financed and only one finance charge. In addition to the folio (CX 1) respondent, since late 1973, has also used a retail installment contract (CX 65) which shows under "ANNUAL PERCENTAGE RATE" two annual percentages. This fails to comply with Section 226.6(c) of Regulation Z (12 C.F.R. §226.6(c)) (Schanker 167-168).

The testimony of respondent's customers and past employee clearly establishes that the 10 percent collecting fee was very confusing as to whether or not it was included in the annual percentage rate and whether it was computed on the cash price or deferred payment price (Halter 29-30, Sticher 42, 44; Gibson 59, 61-62; Tuder 68-69, 76, 83-84).

The term "National & R.R. 10% Collecting Fee" appears on the following contracts: CX 1-CX 43, CX 45, CX 47, CX 69-CX 71, CX 79-CX 81, CX 84-CX 87.

20. In the ordinary course of business, respondent causes to be published advertisements of goods, as "advertisement" is defined in Section 226.2(b) of Regulation Z (12 C.F.R. §226.2(b)). These advertisements aid, promote, or assist directly or indirectly in extensions of consumer credit in connection with the sale of these goods.

Respondent's former employee, Miss Tuder, testified that respondent had placed and directed the terminology of newspaper advertisements (Tuder 78-79; CX 50, CX 55-CX 59; RAR 43), that respondent had directed the terminology on the match covers (CX 51A-B, CX 52A-B; RAR 44) and the ballpoint pens (CX 61, CX 62) which were used for dissemination to the public (Tuder 79-82). Both the matches and the ballpoint pens have been disseminated to the public from 1968 on through at least June 14, 1974 (Tuder 80-82; see also generally, Sanders 197-198).

Respondent started using folios (CX 1) in 1968 to record both credit and cash transactions. He directed the terminology to be used on these folios which were still in use on June 14, 1974 (Tuder 80).

What these exhibits have in common (*e.g.*, CX 1, CX 50, CX 51A-B, CX 52A-B, CX 55-CX 59, CX 61, CX 62) is that they use the term "No money down" without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z (12 C.F.R. §226.8), as required by Section 226.10(d)(2) (12 C.F.R. §226.10(d)(2)) thereof:

(i) The cash price;

(ii) The amount of the downpayment required or that no downpayment is required, as applicable;

(iii) The number, amount, and due dates or period of payment scheduled to repay the indebtedness if the credit is extended;

(iv) The amount of the finance charge expressed as an annual percentage rate; and

(v) The deferred payment price.

(See also RAR 46, 47, 48.)

21. Respondent's credit transactions are other than open end credit transactions and, therefore, come under the purview of Section 226.8 of Regulation Z (12 C.F.R. §226.8) (Schanker 167-169).

RESPONDENT'S DEFENSE OF DISCONTINUANCE

Respondent testified that he had been in the jewelry business since 1959 (Sanders 212), a full ten years before July 1, 1969, the effective date of the Truth in Lending Act (15 U.S.C. 1601, *et seq.*).

Respondent's defense consists almost entirely of a plea of discontinuance. Respondent testified that on or since June 1974, he has attempted in good faith to comply with the requirements of the Truth in Lending Act (Sanders 196-207).

Assuming, *arguendo*, that respondent had not been aware of the Truth in Lending Act on the date it became effective, he was certainly put on notice about the Truth in Lending Act on or about Aug. 15, 1972, when he received a letter from the Federal Trade Commission's Atlanta Regional Office (CX 63A-B) to which respondent Sanders had replied on Sept. 27, 1972 (CX 63C). Respondent Sanders was subsequently visited by officials of the Federal Trade Commission during the end of Jan. 1973 (Schanker 148; Sanders 190).

As of June 14, 1974, the date Miss Tuder had left her employment with respondent, respondent was still using the folio (CX 1) to record credit sales to his customers (Tuder 80, 82, 89; RAR 1, 2, 3, 4, 5, 6, 7). The folio has been in use since 1968 (Tuder 80).

Not until late in 1973 did respondent make an effort to comply fully with the requirements of the Truth in Lending Act by using, in addition to the folio, a retail installment contract in connection with sales consummated with railroad employees in his store and financed through the railroad (CX 65; Tuder 107; RAR 73).[6] However, respondent, during the last two years, frequently went "on the road," and during these trips sold as much as $3,000 of merchandise in three hours to railroad employees (Tuder 71). When credit sales are made "on the road" to railroad employees, the customer only receives as evidence of his indebtedness one of respondent's business cards with limited information written on the back of the card. The information indicates the cost of the merchandise, the 10 percent railroad fee, the 1 1/2 percent collecting fee, and the sales tax. These figures are totaled, the amount of the monthly payments and the number of months to pay are also set forth on the back of the card (Tuder 70). After respondent returned from a "road trip," the customer generally would be mailed a folio as evidence of his indebtedness (Tuder 108). Within the last year, however, instead of subsequently mailing only a folio, as was respondent's practice for similar sales more than a year ago (Tuder 108), he would mail a folio and a retail installment contract (CX 65) to be signed (Tuder 90-91), or in some cases these documents were signed in blank on the road (Tuder 92). In any event, with respect to sales "on the road" made within the last year, the customer did not receive the required cost of credit disclosures either prior to or at the time the sale was consummated, as required by 12 C.F.R. §226.8(a) (15 U.S.C.A. 1638(b)); *Ratner* v. *Chemical Bank New York Trust Co.*, CCH Consumer Credit Guide, ¶ 99.456, 329 F.Supp. 270 (S.D.N.Y. 1971).

An examination of said retail installment contract (CX 65; see also CX 72, dated 8/26/74; CX 73, dated 2/27/74; CX 74, dated 6/10/74; and CX 82, dated 6/10/74), which is presently in use by respondent (RAR 73), reveals that it still fails to comply with the requirements of the Truth in Lending Act, *e.g.*, because on respondent's installment sales contracts only one amount can be financed and one ratio only used to compute the annual percentage rate. CX 65, however, under "ANNUAL PERCENTAGE RATE" has a space for two figures (Schanker 168-169). Apparently no other efforts have been made by respondent since issuance of the complaint in this matter (July 1, 1974) to comply with the requirements of the Truth in Lending Act on his installment contracts.

Matches (CX 51A-B, CX 52A-B) and ballpoint pens (CX 61, CX 62), both bearing the logo "No money down" without other required credit cost disclosures, have been disseminated by respondent to the public for promotional purposes from 1968 on through at least June 14, 1974 (Tuder 78-82). Respondent's newspaper advertisements (CX 55-CX 59) advise the reader that he can purchase respondent's goods with "No money down" without disclosing other required credit cost information. Yet it was not until "several months ago" that respondent had allegedly ceased to advertise "No money down" (Sanders 197).

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[6] On or since June 15, 1972, in addition to the folio, respondent used a retail installment contract (CX 68) for "open account" sales, that is, purchases not financed through the railroad (Tuder 108-110). CX 68 was limited to (a) lay-away transactions, *i.e.*, when merchandise was kept in respondent's store until the customer's financial obligation had been paid, or (b) "open account," *i.e.*, credit transactions not financed through the railroad (Tuder 110).

It is, therefore, clear that respondent, as of this date, has not fully complied in all respects with the requirements of the Truth in Lending Act.

Even assuming, *arguendo*, that respondent is now complying with all the requirements of the Truth in Lending Act, the evidence clearly establishes that his "compliance" insofar as merchandise financed through the railroad would have been subsequent to being contacted in Jan. 1973 by representatives of the Federal Trade Commission. Therefore, as noted in footnote 6 of *Guziak* v. *FTC*, 361 F.2d 700 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967), the Court of Appeals stated that:

> The mere fact that the [respondent] is no longer engaged in some, if not all, of the activities which were the basis for the Commission's action does not prevent the issuance of a cease and desist order against such activities. *Automobile Owners Safety Ins. Co.*, v. *FTC*, 255 F.2d 295, (8th Cir. 1958).

More recently, the Commission stated that:

> It is well established that the mere fact that the offending practices have been discontinued prior to the issuance of a complaint does not provide, by itself, the requisite assurance that an order is unnecessary and not in the public interest. As the courts have noted, it is the timing and circumstances of the claimed abandonment which is of importance to the issue of the necessity for an order. Where, as here, *the abandonment took place only after the Commission's hand was on respondent's shoulder*, the courts are clear that abandonment of the practices under such circumstances will not support a conclusion that the practices will not be resumed. (Zale Corporation, 78 F.T.C. 1233, 1240 (1971) [emphasis supplied]; see also *Spencer Gifts, Inc.* v. *FTC*, 302 F.2d 267 (3d Cir. May 4, 1962); *Damar Products Inc.* v. *United States*, 309 F.2d 323 (3d Cir. 1962); *Marlene's, Inc.* v. *FTC*, 216 F.2d 556, 559 (7th Cir. 1954); *Galter* v. *FTC*, 186 F.2d 810, 812, 813 (7th Cir. 1951), *cert. den.*, 342 U.S. 818 (1951); *Eugene Dietzgen Co.* v. *FTC*, 142 F.2d 321, 330 (7th Cir. 1944), *cert. den.*, 323 U.S. 730 (1944); *Coro, Inc.* v. *FTC*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. den.*, 380 U.S. 954 (1965); *Ward Baking Co.*, 54 F.T.C. 1919 (1958); *Arnold Constable Corporation*, 58 F.T.C. 49 (1961); *Art National Manufacturers Distributing Co. Inc.*, 58 F.T.C. 719, 724 (1961)).

In view of the foregoing, it is clear that the Commission's investigation commenced on Aug. 15, 1972; that a full field investigation was made in Jan. 1973; that as of June 14, 1974, respondent was still using a folio (CX 1) that did not comply with the law; and that as late as Oct. 2, 1974, the date of the hearing, respondent had not complied in all respects with the law. Accordingly, it does not appear that respondent has completely abandoned the unlawful practices, and there is no assurance that without a cease and desist order he will comply with the law.

DISCUSSION

The Truth in Lending Act and the regulations enacted pursuant to it require that certain disclosures be made in connection with consumer credit transactions. The purpose of requiring these disclosures, as stated by Congress in § 1601, is:

> The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

See also S.Rep. No. 392, 90th Cong., 1st Sess. 1-3 (1967); H.R.Rep. No. 1040, 90th Cong., 2d Sess. 7, 13 (1968). The key to assuring that the required disclosures will provide for the knowledgeable use of credit and make "comparison shopping" possible is standardization of what certain credit terms mean. In order to avoid violation of the Truth in Lending Act, a creditor must calculate these terms in compliance with technical statutes and regulations. This technical precision is, however, necessary if the congressional purpose is to be fulfilled. Recognizing this, the courts have found violations of the act based upon slight deviations. See, *e.g., Buford* v. *American Finance Co.*, 333 F.Supp. 1243 (N.D.Ga. 1971) (failure to include one dollar notary fee in "finance charge").

As to the enumerated violations of the Truth in Lending Act, it is clear that the Regulations do make the use of specific terminology mandatory. 12 C.F.R. §226.2(a) [226.6(a)] reads in part, "The disclosures required to be given by this part shall be made * * * in the terminology prescribed in applicable sections." 12 C.F.R. §226.8 in describing what disclosure is required repeatedly uses the format "shall be disclosed: * * * using the term [with applicable term stated in quotation marks]."

In the present case, there is no question that respondent failed to make the required disclosures in proper form.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over respondent.

2. The complaint herein states a cause of action and this proceeding is in the public interest.

3. Respondent, by violating Sections 226.6, 226.8, and 226.10 of Regulation Z (12 C.F.R. §226.6, §226.8, and §226.10), is in violation of the Truth in Lending Act by virtue of Section 103(q) of said Act (15

U.S.C. 1602(q)). Violation of the Truth in Lending Act by virtue of Section 108(c) of the Truth in Lending Act (15 U.S.C. 1607) is a violation of the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*).

4. The facts having been found to be as alleged in the complaint, and respondent having violated the Federal Trade Commission Act, the following order should be issued to protect the public interest.

ORDER

It is ordered, That respondent J. M. Sanders, an individual trading and doing business as J. M. Sanders Jewelry Company, his successors or assigns, respondent's agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement of consumer credit or any advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing in any consumer credit transaction to disclose the price at which respondent, in the regular course of business, offers to sell for cash the property or services which are the subject of the credit sale, and to describe that price as the "cash price," as required by Section 226.8(c)(1) of Regulation Z.

2. Failing to disclose the amount of any downpayment in money made in connection with any consumer credit transaction and to describe that amount as the "cash downpayment," as required by Section 226.8(c)(2) of Regulation Z.

3. Failing to disclose the amount of any downpayment in property made in connection with any consumer credit transaction and to describe that amount as the "trade-in," as required by Section 226.8(c)(2) of Regulation Z.

4. Failing to disclose the sum of the "cash downpayment" and the "trade-in" made in connection with any consumer credit transaction, and to describe that sum as the "total downpayment," as required by Section 226.8(c)(2) of Regulation Z.

5. Failing to disclose the "unpaid balance of cash price" to describe the difference between the "cash price" and the "total downpayment," as required by Section 226.8(c)(3) of Regulation Z.

6. Failing to disclose the "unpaid balance" to describe the sum of the "unpaid balance of cash price" and all other charges included in the amount financed but which are not part of the finance charge, as required by Section 226.8(c)(5) of Regulation Z.

7. Failing to disclose the amount of credit extended, and to describe

that amount as the "amount financed," as required by Section 226.8(c)(7) of Regulation Z.

8. Failing to disclose the sum of all charges made to the customer which are required by Section 226.4 of Regulation Z to be included in the finance charge, and to describe that sum as the "finance charge," as required by Section 226.8(c)(8)(i) of Regulation Z.

9. Failing in any consumer credit transaction to disclose accurately the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

10. Failing to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

11. Failing to disclose the number, amount, and due dates or period of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

12. Failing to disclose the sum of the payments scheduled to repay the indebtedness, and to describe the sum as the "total of payments" as required by Section 226.8(b)(3) of Regulation Z.

13. Stating, utilizing, or placing any information or explanation not required or authorized by Regulation Z in a manner which might tend to mislead or confuse the customer or contradict, obscure, or detract attention from the information required by Regulation Z to be disclosed, as required by Section 226.6(c) of Regulation Z.

14. Stating in any advertisement the amount of the downpayment or that no downpayment is required, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless there is also stated in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

(i) The cash price;

(ii) The amount of the downpayment required or that no downpayment is required, as applicable;

(iii) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness if the credit is extended;

(iv) The amount of the finance charge expressed as an annual percentage rate; and

(v) The deferred payment price.

15. Failing in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and

226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the consummation of any extension of consumer credit or in any aspect of the preparation, creation, or placing of advertising, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

FINAL ORDER

The administrative law judge filed his initial decision in this matter of Dec. 31, 1974, finding respondent to have engaged in the acts and practices as alleged in the complaint and entering a cease-and-desist order against respondent. A copy of the initial decision and order was served on the respondent on Jan. 23, 1975. No appeal was taken from the initial decision.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision should become effective as provided in Section 3.51(a) of the Commission's Rules of Practice.

It is ordered, That the initial decision and order contained therein shall become effective on Feb. 24, 1975.

It is further ordered, That J. M. Sanders, an individual trading and doing business as J. M. Sanders Jewelry Company, shall, within sixty (60) days after service of this order upon him, file with the Commission a report in writing, signed by respondent, setting forth in detail the manner and form of his compliance with the order to cease and desist.

IN THE MATTER OF

BAGATELLE INTERNATIONAL LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2639. Complaint, Feb. 18, 1975 - Decision, Feb. 18, 1975

Consent order requiring a New York City importer of wool blend fabrics and clothing manufacturer, among other things to cease misbranding its wool products and importing wool products into the United States without filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty on them.

Appearances

For the Commission: *Jerry R. McDonald.*
For the respondents: *Jack G. Wasserman*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Bagatelle International Ltd., a corporation, and Irving Weinstein and Sidney Weinstein, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bagatelle International Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1407 Broadway, N.Y., N.Y.

Individual respondents Irving Weinstein and Sidney Weinstein are officers of Bagatelle International Ltd. They formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent.

Respondents are engaged in the importation of wool products, namely wool blend fabrics, the manufacturing of said products into clothing, and the sale and distribution of said items of clothing.

PAR. 2. Respondents, now and for some time last past, have imported for introduction into commerce, manufactured for introduction into commerce, introduced into commerce, transported, distributed, delivered for shipment, shipped, offered for sale, and sold in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain items of clothing stamped, tagged, labeled, or otherwise identified by respondents as "55 percent polyester, 45 percent wool," and "70 percent wool, 30 percent nylon" whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4 (a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely items of clothing with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. Respondents' wool products, namely wool fabrics from which respondents manufacture the garments described in "Paragraph Four" above, were imported by the respondents into the United States and, as particularized in said paragraph, were not stamped, tagged, labeled, or otherwise identified in accordance with the provisions of the Wool Products Labeling Act of 1939. The invoices of said imported wool products required by the Tariff Act of 1930, failed to set forth the information with respect to said wool products required under the provisions of the Wool Products Labeling Act of 1939, to wit, the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers. The respondents did falsify the consignee's declaration provided for in said Tariff Act of 1930 insofar as it related to the above items of information enumerated in this paragraph, in violation of Section 8 of the Wool Products Labeling Act of 1939 and Section 5 of the Federal Trade Commission Act.

PAR. 6. The acts and practices of respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Wool Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Bagatelle International Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1407 Broadway, N.Y., N.Y.

Respondents Sidney Weinstein and Irving Weinstein are officers of said corporation. They formulate, direct and control the acts, practices and policies of said corporation and their addresses are the same as that of said corporation.

Respondents are engaged in the business of manufacturing and distributing clothing in commerce.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Bagatelle International Ltd., a corporation, its successors and assigns, and its officers, and Sidney Weinstein, individually and as an officer of said corporation, and Irving Weinstein, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising or offering for sale in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any wool product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any wool product, which has been advertised or offered for sale in commerce; and in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce of wool products, as the terms "commerce" and "wool products" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Bagatelle International Ltd., a corporation, its successors and assigns, and its officers, and Sidney Weinstein, individually and as an officer of Bagatelle International Ltd., and Irving Weinstein, individually and as an officer of Bagatelle International Ltd., and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from:

1. Importing or participating in the importation of wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents notify, by registered mail, each of their customers that purchased the wool products which gave rise to this complaint of the fact that such products were misbranded.

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and his affiliation with a new business or employment. Such notice shall include each individual respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

IN THE MATTER OF

STEVEN RIZZI, ET AL. T/A FREIGHT LIQUIDATORS

ORDER, OPINIONS, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket 8937. Complaint, July 30, 1973 Decision, Feb. 25, 1975*

Order requiring nine individuals operating a group of retail stores under the trade name of Freight Liquidators in the Washington, D.C., and Baltimore, Md., trading areas, among other things to cease misrepresenting the nature of their business; using misleading corporate or trade name; using bait and switch tactics; and violating the Textile Fiber Products Identification Act by failing to disclose information regarding composition of textile fiber products as required by said Act. The order further dismisses the complaint as to the individual respondent Jerry M. Lytell.

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* For the complaint, *see* 83 F.T.C. 1183.

Appearances

For the Commission: *Everette E. Thomas*, *Richard F. Kelly*, *Alice C. Kelleher* and *Maureen L. McGill*.

For the respondents: *Albert J. Ahern, Jr.*, Baileys Crossroads, Va., *Jacob A. Stein*, *Stein, Mitchell & Mezines*, Washington, D.C., *Richard C. Whiteford*, *Whiteford, Taylor, Preston, Trimble & Johnston*, Towson, Md., *Glen A. Mitchell*, Washington, D.C.

INITIAL DECISION

BY MILES J. BROWN, ADMINISTRATIVE LAW JUDGE

JUNE 27, 1974

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint[1] in this matter on July 30, 1973, charging respondents with unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45), as well as with violations of the Textile Fiber Products Identification Act (15 U.S.C. §70).

Answers were duly filed by respondents Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein, Peter W. Galarneau, George Edward Ommert,[2] Gerald Gautcher and Sam Katz, in which they generally denied the substantive allegations of the complaint as well as the partnership relationships alleged therein, and further denied violating the Federal Trade Commission Act or the Textile Fiber Products Identification Act.

Respondents Sam Katz, Jerry M. Lytell and Mike McKeever all applied to the administrative law judge for Commission-appointed counsel on the grounds of indigency. Pursuant to the requirements of the Commission's Policy Statement (Ad. Bull. 71-21) dated Feb. 1, 1971, a "Statement of Financial Status" form was mailed to each of these three respondents. Respondents Sam Katz and Jerry M. Lytell responded and the administrative law judge made findings on the financial inability of these respondents to retain counsel (Katz, Sept. 28, 1973; Lytell, Nov. 28, 1973). Donald H. Hadley, Esq., accepted designation to represent Mr. Katz on a *pro bono* basis, and he participated throughout the adjudicative hearings. No counsel was ever designated by the Commission to represent Mr. Lytell. Mr. McKeever never returned the required "Statement of Financial Status" form. He was not represented by counsel at the adjudicative hearings.

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[1] The complaint was dismissed as to respondent Steven Rizzi by Summary Initial Decision dated Nov. 13, 1973. The Commission's Final Order of dismissal was entered on Jan. 3, 1974.

[2] Identified in the complaint as George Edward Ommeret.

Nine days of adjudicative hearings were held in Wash., D.C. during Dec. 1973 and Feb. 1974. The record in this proceeding was closed for the reception of evidence on Mar. 1, 1974. On Apr. 5, 1974, proposed findings of fact, conclusions of law, and order were filed by counsel supporting the complaint. By Apr. 19, 1974, respondents Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein, Peter W. Galarneau, George Edward Ommert, Gerald Gautcher, and Sam Katz had filed their proposed findings and reply briefs. Complaint counsel filed replies to the papers filed by Gerald Gautcher and Sam Katz. By order dated May 14, 1974, the Commission extended until June 28, 1974, the time in which the initial decision should be filed.

Any motions appearing in the record not heretofore or herein specifically ruled upon either directly or by the necessary effect of the conclusions in the decision are hereby denied.

Respondents Herbert Millstein (Tr. 26), George Edward Ommert (Tr. 28), Peter W. Galarneau (Tr. 29), Sam Katz (Tr. 67) and Joseph W. Green (Tr. 577) were subpoenaed as witnesses by counsel supporting the complaint and each refused to testify, invoking his Constitutional immunity against self-incrimination. Pursuant to authorization of the Attorney General, the administrative law judge ordered Herbert Millstein, Peter W. Galarneau and George Edward Ommert to testify, granting each of them immunity from prosecution under Title 18, Section 6001, *et seq.*, United States Code. No authorization for granting immunity was secured for Joseph W. Green and he did not testify. Respondent Sam Katz was not recalled by counsel supporting the complaint.

Counsel supporting the complaint offered into evidence a transcript of an investigational hearing of Mar. 8, 1972, at which Joseph W. Green gave testimony concerning the issues in this case. The administrative law judge sustained the objection of counsel for the other respondents and rejected this exhibit (CX A2, rejected) (Tr. 778-787). Counsel supporting the complaint were permitted to make an offer of proof which was admitted into the record as CX AA1 by order dated Mar. 1, 1974.

Although counsel supporting the complaint in their proposed findings have made reference to certain matters contained in their offer of proof, the administrative law judge has not relied on any matter contained in this exhibit. While reliance on the past sworn statement of a witness that refuses to testify may be appropriate where he is the only respondent, in my opinion it would be a denial of due process to permit such evidence as against other individuals who were not present at the investigational hearing and who had no opportunity to cross-examine the witness. Moreover, I do not think the issues in this case are so severable that this evidence could be admitted against one respondent without affecting the rights of the other respondents.

The proposed findings, conclusions and briefs submitted by counsel have been given careful consideration and to the extent not adopted by the decision in the form proposed or in substance are rejected as not supported by the evidence or as immaterial.

This case involves the adjudication of alleged false and misleading advertising and selling practices including the deceptive use of a trade name and certain so-called "bait and switch" tactics by approximately fifteen stores that traded under the name Freight Liquidators in the Washington and Baltimore areas during 1971 and 1972. Respondents' main contentions at this posture of the case go to the responsibility of the several individual respondents for the challenged practices, the sufficiency of the evidence as to their individual conduct with respect to said practices, and the proper form and scope of an order, if any order is deemed appropriate in the circumstances.

Having reviewed the record in this proceeding, and having considered the demeanor of the witnesses as they testified, together with the proposed findings, conclusions and briefs submitted by the parties, I make the following findings as to the facts.

FINDINGS OF FACT

1. Freight Liquidators consisted of a group of retail stores operating under the trade name "Freight Liquidators," that were engaged in the advertising, offering for sale, sale and distribution of rugs, sewing machines, stereo radios and phonographs and various other articles of merchandise to the purchasing public in the Washington, D.C. and Baltimore, Md., trading areas during 1971 and 1972 (See CX series F, L, Q; Millstein, 591-602[3]; Galarneau, 683, 692-693; Ommert, 729, 740).

2. Joseph W. Green, who had been engaged in a sewing machine business in New York, N.Y., moved to the Washington, D.C., area in 1969, and in 1970 he organized several retail stores under the trade name Consumers Buying Service. Shortly thereafter in 1971 the trade

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[3] References are to the pages of the transcript of testimony at the adjudicative hearing preceded by the identification of the witness, most of whom were associated with the Freight Liquidators organization. Consumer witnesses have not been designated by name.

name Freight Liquidators was adopted (Silverman, 69-70, 72-77; Galarneau, 684; Millstein, 587, 590, 659).

3. The "Freight Liquidators concept" was that the use of that name was an effective way of advertising (Silverman, 72-73). Through collective purchasing and collective advertising the individual stores would be able to purchase and sell at lower prices (see Rizzi, 224). Newspaper advertisements for certain products were placed under the name "Freight Liquidators" listing the addresses of the individual stores. The advertised products were purchased under the direction and control of Joseph W. Green by his various employees (Silverman, 116-117; Rizzi, 216; Mullinax, 232; Dolinger, 269-270). Mr. Green was also responsible for preparing and placing the advertisements (Dolinger, 280, 281, 283-284, 289-291; Millstein, 588, 591, 597; Galarneau 692, 719).

4. Joseph W. Green was the owner or part owner of each of the individual Freight Liquidators stores. Although the relationships between Joseph W. Green and the individual respondents and others not named in the complaint were informal, it is clear from the record considered as a whole that these arrangements were in the nature of partnerships and that the individuals involved considered themselves as partners of Joseph W. Green (see CX B 3-14; Silverman, 88, 91, 93, 98-99, 102, 103, 107, 148; Rizzi, 210, 219-220; Dolinger, 271-274, 275-276; Galarneau, 717; Gautcher, 763).

5. Prospective "partners" were solicited through classified advertisements and upon making the required investment of anywhere from $3,000 to $25,000, the partner would be set up at his own store location. Some of these individuals were employees of the Freight Liquidators organization and Joseph W. Green before becoming partners (CXF6; Silverman, 74; Rizzi, 200-203; Begun, 240-241; Dolinger, 268; Gautcher, 760).

6. Mr. Green's individual partners were usually the managers of the store (Silverman, 117-118). The partner's original investment in cash was matched by Mr. Green in merchandise. The leases of the store premises were usually in Mr. Green's name, whereas the business license and the store's bank account were in the name of the manager-partner (Millstein, 592-594, 602; Ommert, 732-33; Gautcher, 763-764). The manager-partner, who was in charge of the day-to-day operation of the store, usually received a guaranteed "draw" per week from the profits and the rest of the profits were shared among the individual partner of partners and Mr. Green, according to their respective interests (Silverman, 107-110, 117-118; Begun, 245; Millstein, 590; Galarneau, 686, 718; Ommert, 731-732, 735; Gautcher, 768). Salesmen were employed on a commission basis which constituted 25 percent of

any profit realized from a sale (Silverman, 120; Stefano, 302; Millstein, 651-653; Galarneau, 691-692).

7. Herbert Millstein, one of Mr. Green's earliest partners, also established several Freight Liquidator stores in the Baltimore area. In those arrangements the manager-partners were half owners and Mr. Millstein and Mr. Green each had a 25 percent interest, sharing in the profits accordingly. The merchandise was supplied to these Baltimore stores from Mr. Millstein's Essex, Md., warehouse. The leases on the various store premises in the Baltimore area were in Mr. Green's name (Millstein, 599-600, 604-608; Ommert, 728-729, 732; Gautcher, 762-763).

8. Peter W. Galarneau, also one of Mr. Green's earlier partners, established a branch Freight Liquidator store as part of his main location (Galarneau, 690). This branch store arrangement was also used by Mr. Millstein and Mr. Green (see CX B 12-13; CX Z 15-17; Galarneau, 682-683; Silverman, 105).

9. Each store was required to report its daily sales to Mr. Green's office or to Mr. Silverman, Mr. Green's accountant (see Silverman, 104, 106, 137; Rizzi, 207-208; Stefano, 294, 299; Galarneau, 706). The several stores paid Mr. Green for the merchandise delivered to them (Rizzi, 215; Stefano, 299-300; Galarneau, 700). In addition, Mr. Green's office billed the stores for their share of the advertising costs, this cost originally being divided equally among the stores, but later computed on the volume of business done by each store (Silverman, 111-115, 129; Brunner, 432; Millstein, 626, 631). None of Mr. Green's individual partners had control over the content of these advertisements (*ibid.*).

10. Mr. Millstein was responsible for the advertising for the Baltimore stores and his arrangement for payment of this cost was similar to that used by Mr. Green (Millstein, 589, 623; Ommert, 732-733; Gautcher, 769). None of Mr. Millstein's partners in the Baltimore area stores had control over the content of the Baltimore advertisements (Ommert, 741; Gautcher, 769).

11. Although most of the products handled by the Freight Liquidators stores were procured by Mr. Green and the headquarters personnel and distributed to the various store locations, when necessary the stores exchanged merchandise (Millstein, 595, 609, 611, 615, 620; Galarneau, 691, 697-698, 706). In some instances the individual partners did some purchasing, and Mr. Millstein purchased certain products for his Baltimore area stores (Ommert, 735; Millstein, 591, 618-619, 629).

12. Respondent Joseph W. Green was the main motivation and controlling force behind Freight Liquidators and he had prime responsibility for the management, direction, policy and control of the Freight Liquidators organization (see Findings 2, 3, 4, 5, 6, 7, 9, 11,

supra; Galarneau, 717-718). Herbert Millstein had principal responsibility for the management, direction, policy and control of the Baltimore area stores (see Findings 7, 10, 11, *supra*).

13. Freight Liquidators has caused their merchandise to be shipped across state lines between their various retail stores located in the states of Virginia and Maryland for sale to purchasers thereof located in the states of Virginia and Maryland and the District of Columbia (see Millstein, 620, 625, 649; Galarneau, 683, 700; CX series F, L, Q). Freight Liquidators business was substantial (CX B 14).

14. In the course and conduct of their business of advertising, offering for sale and sale and distribution of rugs, stereos and sewing machines, and other products, respondents have engaged in a substantial course of trade in commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act (15 U.S.C. 44).

15. Freight Liquidators has caused the dissemination of certain advertisements concerning its articles of merchandise in the Washington Post and Washington Star newspapers, each of which has substantial interstate circulation, for the purpose of and which were likely to, induce, directly or indirectly, the purchase of respondents' merchandise (see CXF 2-11; CXF 13-25; CXF 26-30; CXL 1-4; CXQ 1-2; Tr. 578).

16. The following are typical and illustrative of Freight Liquidators' newspaper advertising and circular advertising:

(a)

PUBLIC NOTICE
(4 DAYS ONLY!)
LIQUIDATION SALE

BANKRUPTCY STOCK - FACTORY & MILL CLOSEOUTS
ALL NEW MERCHANDISE - FAMOUS BRAND NAMES.

$1,287,350 WORTH OF PRE-CUT
RUGS AND MILL-END ROLLS,
TELEVISIONS, STEREOS
AND
COMPONENTS & SEWING MACHINES (HUNDREDS OF ITEMS NOT SHOWN BELOW ARE ALSO ON DISPLAY.)

BE EARLY FOR BEST SELECTION

(see CX F2)

* * * * * * *

(b)

STEREO
UNCLAIMED FREIGHT
BANKRUPTCY STOCK FACTORY CLOSEOUTS
TRUCK LOAD LIQUIDATION

All New Merchandise
LAST NOTICE FOR THIS WEEKEND,
FRIDAY, SATURDAY, SUNDAY & MONDAY

ONLY $88
New 1972 (in cartons), 5-piece Stereo Component Units, 40 Watts, AM/FM radio, a deluxe 4 spd. BSR turntable, 4-speaker sound system, equipped for 8 track tape player, tape recorder, etc. Only $88
Only $147
New 5-piece Components 4-speed Deluxe Turn Tbl., 100 watts, AM/FM radio, deluxe 4-spd. turntable w/diamond stylus, 4-speaker air suspension audio system. Equip. for 8-trk. cassette. Orig. $329. Yours for $147

Only $108

New 1972 (in cartons), famous make, 100 watt tuners w/AM/FM multiplex equipped for 8 track or cassette. Only $108

From Only $88
New console stereo, various sizes & finishes. Lge. assortment w/AM/FM radio & deluxe 4 spd. changer.

FREIGHT LIQUIDATORS
DEAL WITH THE STORE NEAR YOU* * *
(see CXF 4, CXF 11 and CXF 13)

* * * * * * *

(c)

RUGS
12 x 9's $19
WAREHOUSE LIQUIDATION
4 DAYS ONLY!
All 100 percent nylon, acrilan, polyester pile. Full sizes 9x12, 12x12, 12x15, 12x21, 6x9, also odd sizes and various size ovals, In gold, green, red, blue, and other exciting colors. Shags, plushes, twists and sculptured. Will give a warm look to your apt.

OVALS — FRINGES $8
WE LIQUIDATE RUGS FOR FAMOUS SOUTHERN MILLS. ALL ARE GUARANTEED PERFECT.

MASTER CHARGE, BANKAMERICARD, TERMS AVAILABLE
FREIGHT LIQUIDATORS WAREHOUSES
(see CXF 17, CXF 20, CXF 21)

* * * * * * *

(d)

FREIGHT LIQUIDATORS
Deal With The Store Near You* * *

BRAND NEW
SEWING
MACHINES $63
You may own a 1971 "Touch N Stitch"
Zig-Zag, new stretch stitch, embroiders,
monograms, appliques, makes buttonholes,
etc., all without attachments; Ordered
for schools, "UNCLAIMED BY THEM." 25-yr.
guarantee and instructions.

(see CXF 12, 14, 15, 19, 22, 26)

17. By and through the use of the name "Freight Liquidators," separately or in connection with other statements or representations in advertising, respondents have represented to customers and prospective customers that the organization was one of liquidators, authorized adjustors or agents engaged in the sale or distribution of bankrupt, salvage, distrained or other transportation company surplus merchandise for the purpose of liquidating, adjusting, paying off or otherwise settling indebtness or claims (see Finding 16, *supra.*).

18. By and through the use of the name "Freight Liquidators" separately or in connection with other statements or representations in advertising, respondents have represented to customers and prospective customers that the merchandise advertised was bankrupt, salvage, distrained, distress or transportation company surplus merchandise, and therefore had a unique or special disposition and thus was being offered for sale at prices below those usually and customarily charged at retail (see CX series F, L, Q; Consumer witnesses, Tr. 308, 381, 459-460, 483-484, 486, 359, 503-504; CXF 4, 28).

19. In their advertisements respondents also represented that purchasers of the advertised products were being afforded savings equal to the differences between Freight Liquidators' advertised prices and those at which the merchandise was usually and customarily sold at retail, that the amount designated as "Orig." was the price at which the merchandise had been sold by Freight Liquidators in the recent regular course of business and that purchasers of the merchandise advertised were afforded savings equal to the difference between the higher and lower prices listed in said statements (see CXF 8, 9, 10, 12, 14, 15, 18, 19, 22, 24, 25, 26).

20. Freight Liquidators was not an organization of liquidators, authorized adjustors or agents engaged in the sale or disposition of bankrupt, salvage, distrained or other distress or transportation

company surplus merchandise for the purpose of liquidating, adjusting, paying off or otherwise settling indebtedness or claims. Instead, Freight Liquidators was in the business of purchasing the advertised merchandise from manufacturers or suppliers and selling it at retail for their own account to the purchasing public (See Mullinax, 235-238; Millstein, 629-630). Merchandise advertised by Freight Liquidators was not bankrupt, salvage, distrained, distress or transportation company surplus merchandise, and therefore, did not have a unique or special disposition. Only a minute quantity of merchandise, if any, could have properly been described as "bankruptcy" merchandise. The advertised merchandise was not being offered at prices below those usually and customarily charged at retail (Millstein, 629-630, 636-640; CXF 2; see Brunner, 431; Galarneau, 708-711).

21. Purchasers of the advertised merchandise were not afforded savings equal to the differences between Freight Liquidators' advertised prices and those at which the same merchandise was usually and customarily sold at retail. Said merchandise had not been customarily and usually sold at retail by Freight Liquidators in the recent, regular course of their business for the amounts set out in the advertisements as "Orig." Purchasers of the merchandise advertised were not afforded savings equal to the differences between the higher and lower prices listed in the statements (see Consumer witnesses, Tr. 312, 314, 315, 321-322, 488-489, 504; Millstein, 641, 712, 743).

22. The representations set forth in Findings 17, 18 and 19, *supra*, were untrue and had the tendency and capacity to mislead prospective customers.

23. By and through their advertisements and the statements and representations contained therein respondents represented that they were making a bona fide offer to sell the advertised merchandise at the price and on the terms and conditions stated in the advertisements. In this connection, respondents represented that they were making a bona fide offer to sell a complete and operable sewing machine for the advertised price (Consumer witnesses Tr. 355, 521-522, 482-484, 513-514).

24. Freight Liquidators was not making a bona fide offer to sell certain of the advertised merchandise at the price and on the terms and conditions stated in the advertisements. Such "offers" were made primarily to obtain "customer leads" in order to sell them more expensive merchandise (see Findings 25, 26, *infra*).

25. Members of the purchasing public who responded to such advertisements were either told by Freight Liquidators' salesmen that the merchandise was not available, or they found that the salesmen were very reluctant to show the merchandise to them (Consumer

witnesses, Tr. 511, 516, 532, 550, 555). Because of the poor appearance and quality or unattractive display of the samples of advertised merchandise, Freight Liquidators' customers were immediately attracted to higher priced, better quality merchandise sold by Freight Liquidators (Consumer witnesses, Tr. 311, 415, 474, 498-500, 515-517, 547-550, 539-542; see Rizzi, 218; Begun, 249, 257-258; Stefano, 296-298). Very few actual sales were made of the advertised products at the price and on the terms set forth in the advertisements (CXX1, 2), and salesmen attempted to sell the better quality, and more expensive merchandise (Consumer witnesses, Tr. 532, 540, 550).

26. Freight Liquidators was not making a bona fide offer to sell a complete sewing machine without attachments for the advertised price. The advertised price was for the sewing machine head and did not include such essentials as a base or stand containing the operating controls and without which the head of the machine was useless (Griffith, 165-170, 195-196; Begun, 247-248, 254-255; Consumer witnesses, Tr. 315, 355, 412, 415-416, 457-460, 482-483, 491, 513-514, 521-522, 533-534). Freight Liquidators sold very few sewing machines at the advertised price of $58 or $63 without also selling attachments necessary for operation for an additional price of $15 or $30 (see Begun, 255-257; CXX 1).

27. The representations set forth in Finding 23, *supra*, were untrue and had the tendency and capacity to mislead prospective customers.

28. By and through their advertisements and the statements and representations contained therein respondents represented that certain of Freight Liquidators' products were unconditionally guaranteed for various periods of time, such as twenty-five years (CXF 8, 12, 14, 15, 19, 22, 24, 26; Consumer witnesses, Tr. 383, 395).

29. Freight Liquidators' products were not unconditionally guaranteed for the period of time as represented in their advertisements or as orally represented by Freight Liquidators' salesmen. The only guarantees for the products sold by Freight Liquidators were that which were provided by the manufacturers thereof, and such guarantees were subject to conditions and limitations not disclosed in Freight Liquidators' representations (Millstein, 642-643; Consumer witnesses, Tr. 396, 465-467).

30. The representations set forth in Finding 28, *supra*, were untrue and had the tendency and capacity to mislead prospective customers.

31. By and through their advertisements and the statements and representations contained therein, respondents represented that the quantities of merchandise and time during which such were available for sale were limited (CXF 11, 13, 16, 17, 20, 21, 23; Consumer witnesses, Tr. 396, 400-401).

32. The quantities of merchandise and the time during which such were purportedly available for sale was not limited but identical merchandise was available at all times relevant herein (Consumer witnesses, Tr. 393-396, 401-402; Millstein, 643-644; Galarneau, 714).

33. The representations set forth in Finding 31, *supra*, were untrue and had the tendency and capacity to mislead prospective customers.

34. In their advertising respondents used the term "Acrilan" to describe certain rugs without stating the true generic name of the fiber content of such rugs. In addition where respondents advertised the fiber content of their rugs they did not disclose that such information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding (CXF 11, 13, 16, 17, 20, 21, 23).

35. During the period of time relevant hereto, there were at least 18 Freight Liquidators stores that operated in the Washington-Baltimore area. These stores were located at the following addresses (CX B2, 12, 13; CXQ 1, 2; CXF 1, 2, 8; CXL 3):

4689 King Street, Arlington, Va.[4]
7849 Eastern Ave., Silver Spring, Md.
1065 Broad Street, Falls Church, Va.
1727 Wilson Blvd., Arlington, Va.
7515 Lee Highway, Merrifield, Va.
912 Center St., Manassas, Va.
127 Cope Street, Woodbridge, Va.
8651 Richmond Hwy., Alexandria, Va.
4801 Suitland Rd., Suitland, Md.
11200 Baltimore Ave., Beltsville, Md.
5459 Annapolis Rd., Bladensburg, Md.
5552 Kenilworth Ave., Riverdale, Md.
14811 Washington Blvd., Laurel, Md.
442 Eastern Blvd., Essex, Md.[5]
1616 N. Ritchie Highway, Glen Burnie, Md.
4706 Hollins Ferry Rd., Baltimore, Md.
716 Reisterstown Rd., Reisterstown, Md.
939 York Rd., Towson, Md.

36. Respondent, Herbert Millstein, who is presently the owner and manager of Herbmar, Inc., a retail carpet store, first became acquainted with Joseph W. Green in 1971, and in April of that year opened the Suitland, Md., store as a partner of Mr. Green. The lease was in Mr. Green's name, the occupancy permit in Mr. Millstein's name (Millstein, 585-594).

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[4] This address was sometimes listed as Alexandria, Va. The executive offices of Freight Liquidators also were located at the King Street address.

[5] Herbert Millstein's warehouse for the Baltimore area stores was located at the Essex, Md., location.

37. Sewing machines, stereos and carpets, the advertised products, were supplied by Mr. Green to the Suitland location. Mr. Millstein also handled other products which he purchased (Millstein, 595).

38. In late 1971 Mr. Millstein opened a store in Gaithersburg, Md., which was stocked from the Suitland store. This Freight Liquidators store was closed in the early part of 1972 and apparently was moved to the Reisterstown, Md., location (Millstein, 668-669; Ommert, 728).

39. During the first three months of 1972, Mr. Millstein opened four stores in the Baltimore area, in Essex, Md., in Reisterstown, Glen Burnie and Towson, Md. (Millstein, 604-608; Begun, 242, 244; Ommert, 728; Gautcher 762-767). The Essex store was stocked from Mr. Millstein's Suitland store and the other three from a warehouse located at the Essex store (Millstein, 619). Mr. Green was a part owner in each store as an extension of his partnership with Mr. Millstein, although the shares of ownership varied. Each store lease was in Mr. Green's name. Mr. Millstein made direct purchases from manufacturers for items handled in the Baltimore stores (Millstein, 627-630).

40. Mr. Millstein was responsible for placing the advertising on behalf of the Baltimore stores in the Baltimore News American and the Baltimore Sun (Millstein, 623). He did not formulate or have control over the advertisements run in the Washington, D.C., newspapers which were placed by Joseph W. Green, although he paid the share of the cost of those advertisements applied to his Freight Liquidators stores (Millstein, 631-632). The Baltimore advertising, although not exactly the same as used in Washington, did contain such representations describing the advertised items as "unclaimed freight" and, "bankruptcy stock," and did offer the sewing machine for $63 which required the purchase of a cabinet or case to be operable. At certain times these advertisements represented that there was a limited time for the advertised offering (Millstein, 647-654).

41. Respondent Harold J. Green is Joseph W. Green's son and he was a partner of Mr. Green in the Freight Liquidators stores located at King Street, Arlington, which was opened in Mar. 1971 when the main office of Freight Liquidators was moved from Falls Church. Harold J. Green was also Mr. Green's partner in the Riverdale, Md., store which opened in Oct. 1971 (CXB 8, 10, 12-13; Silverman, 94, 108).

42. Respondent John Green, also the son of Joseph W. Green, was a partner of his father in the Freight Liquidators stores located at Richmond Highway, Alexandria, and Eastern Avenue, Silver Spring. The Silver Spring store was opened in 1970, and the Alexandria store was opened in May 1971. John Green was also a partner in the Bladensburg, Md., store which was opened in Nov. 1971 (CXB 6, 7, 11; Silverman, 97-98, 100; Millstein, 622).

43. Respondent Peter W. Galarneau, owner of Carpet Caravan, a corporation engaged in the retail carpet business, was employed by Joseph W. Green in 1970 in connection with Consumer Buying Service, and this relationship carried over to Freight Liquidators. In July 1971 Mr. Galarneau became Mr. Green's partner in the Wilson Blvd. store, in which he invested $5,000 (CXB 4, 12-13). The lease in this store was in Mr. Green's name. In Dec. 1971, Mr. Galarneau opened the Manassas store as a part of the Wilson Blvd. store. In connection with this branch store Mr. Galarneau did some advertising in the Manassas media. Over 90 percent of the merchandise handled by Mr. Galarneau was supplied by Mr. Green from the King Street warehouse. The Manassas store was closed in the spring of 1972, and Mr. Galarneau went out of business at the Wilson Blvd. location in Sept. 1972 (Galarneau, 683-684, 694, 698, 687, 715).

44. Respondent Jerry M. Lytell was a partner of Joseph W. Green in the Falls Church store of Freight Liquidators, and later was a one-third partner of Sam Katz and Joseph W. Green in the Laurel, Md., store (CX B 9, 12-13; Silverman, 101-102; Rizzi, 214, 219; Dolinger, 272; Stefano, 292; Brunner, 428; Millstein, 610-611).

45. Respondent Sam Katz was a partner of Joseph W. Green and Jerry M. Lytell in the Laurel, Md., store from February 16, 1972 until May 9, 1972 (see Katz Answer to Complaint; Silverman, 102-103; Dolinger, 273; Millstein, 613-615; Galarneau, 702-703).

46. Respondent Mike McKeever was a partner of Joseph W. Green in the Riverdale, Md., store having put up $25,000 for the opportunity (Silverman, 107; Rizzi, 205). He had contacted Freight Liquidators early in 1972 in response to a business-opportunity advertisement (Rizzi, 202, 204). The following language is representative of such an advertisement (CXF 6):

"WANTED! PARTNER!!!!
Instant Money Maker
NAKED TRUTH - BARE FACTS
This is a once in a lifetime opportunity for
longevity in success. Successful national company
is interested in a working partner to take full
charge of outlet store in Northern Virginia or
Maryland, generating 1-2 million annual gross
through a unique method of Unclaimed Freight
Liquidation, disposing of Stereos, TV's, Rugs,
etc. If you qualify and can invest $25,000 and
are available immediately, for further information
call:
Many other areas available

Steven T. Rizzi
FREIGHT LIQUIDATORS"

47. Respondent George Edward Ommert, who is in the retail unfinished furniture and carpet business, was a partner of Joseph W. Green and Herbert Millstein in the Gaithersburg and Reistertown stores (Silverman, 104-105; Ommert, 727-729). Although starting as Mr. Millstein's employee in Suitland, he took over the Gaithersburg store as a partner late in 1971 upon investing $10,000. He moved to Reistertown in Apr. 1972. He ceased doing business as Freight Liquidators in Nov. 1972. Almost all of Mr. Ommert's merchandise was supplied by Mr. Millstein (Ommert, 727-736).

48. Respondent Gerald Gautcher, who owns several retail carpet businesses including Carpet Carryout, Carpet Cleaner and Decor Interiors, contacted Freight Liquidators in Oct. 1971 in response to an advertisement and was referred to Mr. Millstein by Mr. Green. He was established as a partner in the Towson store in Jan. 1972, investing $5,000. His merchandise was supplied by Mr. Millstein from the Essex store. The store lease was in Mr. Green's name. Mr. Gautcher ceased operations as Freight Liquidators in mid-April 1972 (Gautcher, 761-767; see Begun, 264-266; Millstein, 656-658).

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein, Peter W. Galarneau, George Edward Ommert, Gerald Gautcher, Sam Katz, Mike McKeever, and Jerry M. Lytell.

Said respondents have, during all times or part of the time relevant hereto, engaged in interstate commerce within the intent and meaning of Sections 4 and 5 of the Federal Trade Commission Act. There is no doubt on this record that Freight Liquidators advertised in commerce. The newspapers in which such advertisements were placed have interstate circulation. In addition, Freight Liquidators was engaged in a course of trade in commerce. It purchased merchandise from suppliers located outside the District of Columbia, Maryland and Virginia. Merchandise was transferred from the Arlington, Va., King Street, location to the stores in Maryland, and among the various stores in Maryland and Virginia. The individual Freight Liquidators stores attracted and sold to customers from all three jurisdictions. All acts and practices that were part of these transactions were methods of competition in commerce or acts and practices in commerce within the coverage of the Federal Trade Commission Act. *Holland Furnace Co.* v. *Federal Trade Commission*, 269 F.2d 203 (7th Cir. 1959), *cert. denied*,

361 U.S. 932; *Guziak* v. *Federal Trade Commission*, 361 F.2d 700 (8th Cir. 1966); see *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951).

2. The acts and practices of respondents that were challenged in the complaint and in which they were found to be engaged, were and are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

It is well established that it is an unfair trade practice to make statements in advertising which have the tendency and capacity to deceive the prospective customer. *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F.2d 523 (5th Cir. 1963); see *Spiegel, Inc.* v. *Federal Trade Commission*, 494 F.2d 59 (7th Cir. 1974). It is not essential that the Commission find actual deception to support its complaint when the representations have the capacity to deceive. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F.2d 676 (2d Cir. 1944); *Regina Corp.* v. *Federal Trade Commission*, 322 F.2d 765 (3d Cir. 1963); *Montgomery Ward & Co.* v. *Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967). The Commission may challenge and prevent true statements if, when considered in the context of all representations made, the advertisement has that tendency and capacity to mislead. *J. B. Williams Co.* v. *Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967).

Furthermore, where the advertisements themselves sufficiently demonstrate their capacity to deceive, the Commission can find the requisite deception or capacity to deceive on a visual examination of the exhibits without evidence that the public was actually deceived. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Double Eagle Lubricants, Inc.* v. *FTC*, 360 F.2d 268, 270 (10th Cir. 1965); *Mohr* v. *Federal Trade Commission*, 272 F.2d 401, 405 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960). It is no defense to a charge of engaging in unfair trade practices to assert that the customer was advised of the truth or of all material facts before making his choice to purchase. The initial contact, if deceptive, may be prohibited under the Federal Trade Commission Act. *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F.2d 869, 873 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *Carter Products, Inc.* v. *Federal Trade Commission*, 186 F.2d 821, 824 (7th Cir. 1951).

All of the acts and practices challenged in the complaint and in which respondents were found to be engaged had the requisite tendency and capacity to deceive. Moreover, the conclusion that each practice constitutes an unfair trade practice accords with applicable case law. It is an unfair trade practice to misrepresent the origin and character of one's business or the merchandise offered for sale by the use of a trade name or false advertising claims. *Goodman* v. *Federal Trade Commission*, 244 F.2d 584 (9th Cir. 1957); *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 216 (1933); *Resort Car Rental System, Inc.*, F.T.C. Docket 8862 (July 31, 1973); *New Crosstown Railroad Salvage Co.*, 68 F.T.C. 47 (1965).

It is an unfair trade practice to advertise a product in order to obtain contact with a prospective customer for the purpose of selling another product. *Tashof* v. *Federal Trade Commission*, 437 F.2d 707 (D.C. Cir. 1970); *Pati-Port, Inc.* v. *Federal Trade Commission*, 313 F.2d 103 (3d Cir. 1968). In this respect, the Commission need not show evidence of disparagement of the advertised product. It may infer that customers were "switched" from the advertised product by evidence of the type of advertising used and relatively minimal sales of the advertised products. *Tashof* v. *Federal Trade Commission, supra; Giant Food Inc.* v. *Federal Trade Commission*, 322 F.2d 977 (D.C. Cir. 1963).

It is an unfair trade practice to misrepresent that a price is a "sale" price, if in fact it is the usual and customary price at which the product is sold. *Niresk Industries* v. *Federal Trade Commission*, 278 F.2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883; *Heavenly Creations, Inc.* v. *Federal Trade Commission*, 339 F.2d 7, 8 (2d Cir. 1964), *cert. denied*, 380 U.S. 955 (1965).

It is an unfair trade practice to offer an unconditional guarantee in an advertisement when in fact there are undisclosed conditions on the terms of the actual guarantee. *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Coro, Inc.* v. *Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Montgomery Ward & Co.* v. *Federal Trade Commission, supra*.

It is an unfair trade practice to falsely represent that a price offer is for a limited time only or that quantities of an advertised product are limited. See *ADF Warehouse, Inc.*, 66 F.T.C. 1267 (1954).

Finally, it is a violation of Section 4(c) of the Textile Fiber Products Identification Act and Sections 11 and 41(c) of the rules and regulations promulgated thereunder to describe in advertising the content of any rug product by using its trade name without also stating its generic name and without disclosing that any such information relates only to the face, pile or outer surface of the floor covering, and not to the backing filling or padding, and such conduct constitutes unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce under the Federal Trade Commission Act.

3. Respondents Joseph W. Green and Herbert Millstein were responsible for their own actions as well as for all actions and practices of the Freight Liquidators organization. Between them they exercised complete control of the organization and are liable for all of the deceptive acts and practices in which it was found to be engaged. Joseph W. Green was the motivating and controlling force behind the organization, was responsible for its management, direction, policy and control, and had an interest in all of the individual stores. Herbert Millstein was Mr. Green's close associate and partner, actively participating in the Freight Liquidators scheme, and exercising authority, direction, control and policy of the affairs of the stores in Suitland, Gaithersburg and the Baltimore area. *Guziak* v. *Federal Trade Commission*, 361 F.2d 700 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007; *Benrus Watch Co.* v. *Federal Trade Commission, supra; Bruhn's Freezer Meats of Chicago, Inc.* v. *U.S. Dept. of Agriculture*, 438 F.2d 1332 (8th Cir. 1971); *Cotherman* v. *Federal Trade Commission*, 417 F.2d 587 (5th Cir. 1969); *Surf Sales* v. *Federal Trade Commission*, 259 F.2d 744 (7th Cir. 1958). It is well established that those who place in the hands of others the instrumentality by which unfair and deceptive acts and practices are conducted may be held responsible for said trade practices. *Federal Trade Commission* v. *Winsted Hosiery Co.* 258 U.S. 483, 494 (1922); *Regina Corp.* v. *Federal Trade Commission, supra.*

The other individual respondents, Peter Galarneau, Harold J. Green, John Green, Jerry Lytell, Sam Katz, Mike McKeever, George Edward Ommert and Gerald Gautcher had no control over the content of the advertising that was challenged in this proceeding. Although it is concluded that they were Joseph W. Green's partners, the record shows they were primarily manager-salesmen at the various Freight Liquidators store locations, usually receiving a fixed salary-commission and sharing the profits with Mr. Green and any other partner of that store. And although the consumer testimony clearly establishes the manner in which the Freight Liquidators' method of business was implemented in the stores, such testimony does not identify any of the individual respondents as being engaged in any particular unfair trade practice.

In the briefs filed on behalf of the individual respondents who were represented by counsel, it is argued generally that under the circumstances the Commission has failed to prove that they were engaged in the challenged conduct and that, accordingly, are not responsible for the challenged practices (see Proposed Findings Green; Proposed Findings Millstein).

Counsel supporting the complaint contend on the other hand, that each of these individuals, because of his partnership relationship with Joseph W. Green, was an integral part of the Freight Liquidators organization and its scheme, that each partner was essential to the implementation of that scheme, and that each one is responsible for all the actions of the organization. In effect, counsel contend that as active partners these individual respondents, having benefited from the Freight Liquidators' operation, ratified the advertising and the deceptive representations therein and the unfair trade practices resulting therefrom, and, accordingly, each and every one was individually responsible therefore.

This case presents what appears to be a unique situation. Although the fact that the individual respondents were partners is clearly established, their respective roles varied, not only with respect to implementing the Freight Liquidators scheme, but also with respect to the point of time and place in which they participated. This presents a situation where individual participation and responsibility was a matter of degree.

It should be emphasized that the Commission has not held officers of corporations, partners, or salesmen vicariously liable for the conduct of the businesses with which they are associated. As I read the cases, there must be some indicia of control, some power to change, alter or influence the course of events involved. In the usual situation all active partners would be presumed to have such power. But this does not appear to be the fact in the instant case.

In my opinion the record clearly demonstrates that Peter Galarneau, Harold J. Green, John Green, and Jerry Lytell were sufficiently involved to be held responsible. I believe that the single fact that is most controlling is that each was involved in more than one store location; each was responsible for furthering the Freight Liquidators scheme for their own benefit. In my opinion this constitutes ratification of the advertising and other elements of the challenged conduct. See *Star Office Supply Co.*, 77 F.T.C. 383, 445 (1970), *aff'd per curiam*, 2d Cir. No. 35066 (1972) (not reported); *Park, Austin & Lipscomb, Inc.* v. *Federal Trade Commission*, 142 F.2d 437 (2d Cir. 1944), *cert. denied*, 323 U.S. 753.

It was not necessary for Commission counsel to prove that each individual respondent personally did the challenged acts and practices or any element of the overall selling scheme. Responsibility, if it exists, may attach from the nature of the individual's involvement in the organization. There is no doubt that all of the above respondents were deeply involved in the organization, participating fully in its operation.

On the other hand Sam Katz, Mike McKeever and Gerald Gautcher were relatively late comers into the organization and were only concerned with single stores for very short periods of time. Not only were they induced into becoming partners by questionable representations as to the nature of the Freight Liquidators operation, but it appears that their sizeable investments became liabilities and that they actually were victims of the Freight Liquidators organization and the other partners.

Somewhere in between these two groups of respondents stands George Edward Ommert. Employed for a while by Mr. Millstein, Mr. Ommert took over the Gaithersburg store and subsequently the store was moved to Reisterstown, Md. In the general circumstances of this case and in view of Mr. Ommert's demeanor on the stand, I am convinced that he was more of a victim of Freight Liquidators and Mr. Millstein, than an active purveyor of deception. Accordingly, I hold that Mr. Ommert was in the same category as Sam Katz, Mike McKeever and Gerald Gautcher.

Thus consistent with controlling case law, it is concluded that Peter Galarneau, Harold J. Green and John Green and Jerry Lytell are individually responsible for the unfair trade practices engaged in by Freight Liquidators and that the Commission has the power and authority to enter an appropriate order to cease and desist covering their future conduct.

However, as pointed out above, the Commission did not secure counsel for Mr. Lytell even though he had made a timely request therefore, and was found by the administrative law judge to be indigent. Under the authority of the Commission's decision in *American Chinchilla Corp., et al.*, 76 F.T.C. 1016, 1034 (1969), and the policy announced in Ad. Bull. No. 71-21, the administrative law judge must dismiss the complaint without prejudice as to Jerry Lytell.

On the other hand Sam Katz, George Edward Ommert, Mike McKeever and Gerald Gautcher are not individually responsible for the unfair trade practices in which Freight Liquidators, Joseph W. Green and Herbert Millstein and the other respondents were found to have been engaged, and the complaint should be dismissed as to these respondents with prejudice.[6]

THE REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to ensure discontinuance of the unlawful practices found. *Federal Trade Commission* v. *Colgate-Palmolive Co., supra*. The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613

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[6] Dismissing the complaint as to Mike McKeever renders moot the additional questions as to whether he was in default or whether the Commission policy announced in *American Chinchilla* should have been pursued even though Mr. McKeever failed to return the required statement to substantiate his claim of indigency.

(1946); *Niresk Industries, Inc.* v. *Federal Trade Commission, supra.* It is well settled that the Commission may require affirmative statements in advertising where failure to make such statements leaves the prospective consumer without all the material facts on which to base his choice as to whether to do business with the advertiser or purchase the product advertised. *Federal Trade Commission* v. *Colgate-Palmolive Co., supra; Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

Counsel supporting the complaint have proposed an order which, except for slight modifications, is substantially similar to the notice order which was attached to the complaint.

Respondents contend that there has been no showing that the imposition of any order would be in the public interest, because Freight Liquidators has ceased to exist, the challenged practices have been abandoned, and that there is "nothing in the record to indicate that these respondents will in the future experiment with any of the practices which were the subject of the complaint" (Proposed Findings Green; Proposed Findings Millstein).

Discontinuance or abandonment of unfair trade practices does not render a cease and desist order improper. The statutory scheme contemplates the issuance of an appropriate order to protect the public prospectively from any possible resumption of the unfair trade practices in which respondents were found to be engaged without the statutory sanctions available for future enforcement. *Benrus Watch Co.* v. *Federal Trade Commission, supra; Montgomery Ward & Co.* v. *Federal Trade Commission, supra; Clinton Watch Co.* v. *Federal Trade Commission*, 291 F.2d 838 (7th Cir. 1961); *Doherty, Clifford, Steers & Shenfield* v. *Federal Trade Commission*, 392 F.2d 921 (6th Cir. 1968). In a case such as this where the individual respondents are still engaged in retail businesses the imposition of an order to cease and desist against those who were responsible is fully justified. However, it should be pointed out that it is not up to complaint counsel to prove respondents' present vocations or disposition toward continuing the challenged practices.

The order to cease and desist proposed by complaint counsel would require each respondent to include in any advertisement for at least a year after said order becomes enforceable a so-called consumer warning disclosure stating as follows:

> The Federal Trade Commission has found that we engage in bait and switch advertising. That is, the salesmen make it difficult to buy the advertised product and he attempts to switch you to a higher priced item.

Respondents contend that "the Commission has no authority to require respondents to publish in their advertising the black bordered pronouncement setting forth that respondents bait and switch." They assert that such an advertisement is a declaration of a present intent to "bait & switch" customers and would make it impossible for respondents to earn a living in the retail sales business (Proposed Findings Green; Proposed Findings Millstein).

It is clear that the Commission's power to direct whatever relief is reasonably necessary to prevent recurrence of business practices it has found to be unlawful extends beyond mere prohibitions against the continuation of the illegal practices themselves. The Commission may require affirmative disclosure of any material fact, which if known to the prospective customer, might affect his choice of whether to do business with the particular advertiser. *Federal Trade Commission* v. *Colgate-Palmolive Co., supra.* In my opinion an appropriate consumer warning may be required by the Commission.

The need for such a disclosure in the circumstances of this case is manifest. First, by its very nature, the practice of "bait & switch" as demonstrated in this case can be done so smoothly that few consumers realize, or for that matter will complain, that they were victims of such a scheme. Second, consumers are entitled to know what prohibitions a retailer is operating under. Armed with such knowledge the prospective customer is in a better position to make an independent choice as to the product, if any, he wishes to purchase. Of course the possibility that a prospective consumer is aware of any such prohibition on the retailer will serve as an incentive for compliance with the terms of the order.

The consumer warning proposed by counsel supporting the complaint by its very terms presupposes that respondents will continue to engage in "bait & switch" practices and further infers that respondents are violating the terms of the order. To require any respondent to make such a statement would be quite punitive.

I am also of the opinion that the use of the colloquial term "bait & switch" in the consumer warning is also punitive. There are many variations on the scheme. In fact, the definition which is included in the proposed consumer warning is really only an example. Nor does the term itself appear in the complaint, or any other part of the proposed order. Although this term has a generic meaning to attorneys dealing in consumer protection matters, it is far from a precise concept. At this posture of the case the *order* is the thing. I think that the consumer warning should be keyed to the cease and desist order instead of the past proceeding.

In the circumstances the following affirmative disclosure will be substituted for the proposed consumer warning, it being my opinion that it is truthful, understandable, useful, remedial, and not punitive:

> We are subject to the prohibitions of a Federal Trade Commission Order in Docket

8937, that requires us to sell the products which we advertise without attempting to sell you a different item or a higher priced item.

Insofar as respondents' argument that any requirement that they use a consumer warning would make it impossible to earn a living in the retail sales business carries over to the substitute disclosure, it must be rejected. The consumer is entitled to this information, and any adverse result is the price a violator of the Federal Trade Commission Act must be expected to pay if he continues to advertise.

Respondents also object to certain paragraphs of the order contending that Paragraphs 5 and 6 are encompassed in Paragraphs 3(a), (b) and (c) and are unnecessary, and that Paragraphs 5 and 6 are also covered by Paragraph 7. Although the order does appear somewhat redundant, each paragraph clearly apprises respondents of the prohibitions on future conduct, and each is reasonably related to the proven illegal practices.

Paragraphs 4, 9 and 12 of the order are attacked as punitive because, respondents assert, they would be required to keep records "beyond the capabilities of the small retailers which the evidence shows these respondents to be."

Although the exact manner of compliance and the difficulties of bookkeeping would depend entirely on the type of advertisements used by respondents in the future, the requirements of the order in this respect seem reasonable. Compliance with Paragraph 9 should not require much in the way of bookkeeping, merely separate filing of copies of customer contracts relating to such transactions. With respect to establishing "net profits" on such sales, the other relevant information would be the purchase invoices showing the cost. Likewise, keeping track of advertising costs should be neither a difficult nor an unusual procedure.

Compliance with Paragraph 12 is necessary only if respondents choose to advertise in such way. If a supply of a particular product is in fact limited to a respondent, such fact should not be too difficult to establish. Finally, if the savings claim in Paragraph 4 is a claim of savings from respondents' usual selling price, the relevant information would be the invoices from respondents' prior sales of that item. Such information would presumably be kept in the usual course of business. If the savings claim involves comparison with competitors' prices for the same or comparable merchandise, respondents merely have to document the basis for making the representation in the first place. See *Tashof* v. *Federal Trade Commission, supra.*

Paragraph 10 of the proposed order would require respondents to cease and desist from "[a]dvertising or offering merchandise for sale when the advertised merchandise is inadequate for the purposes for which it is offered." Claiming that the word "inadequate" is peculiarly vague, respondents contend that Paragraph 10 "is an attempt to convert the original sewing machine bait and switch theory into a products liability prosecution." I find nothing in the record in this case which directly supports this paragraph of the order. Presumably, the fact that the $63 sewing machine was incomplete made it inadequate as a sewing machine, or that because the $19 rug was like a "shower curtain" made it inadequate for wall-to-wall carpeting. I agree with respondents that the term "inadequate" as used in Paragraph 10 is unduly vague, and Paragraph 10 will be stricken.

ORDER

It is ordered, That respondents Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein, and Peter W. Galarneau, individually, and/or as copartners, trading and doing business as Freight Liquidators, or under any other trade name or names, and each of respondents' agents, representatives and employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of rugs, sewing machines, stereo radios and phonographs, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Liquidators," "Freight," "Forwarding," or any other word or words of similar import or meaning in or as part of respondents' corporate or trade name or names; or representing, orally or in writing, directly or by implication, that they are liquidators, authorized adjustors or agents engaged in the sale or disposition of bankrupt, salvage, distrained, distress, or transportation company surplus merchandise; or are engaged in liquidating, adjusting, paying off or otherwise settling indebtedness or claims; or misrepresenting, in any manner, their trade or business status.

2. Representing, directly or indirectly, orally or in writing, that any merchandise offered for sale is bankrupt, salvage, distrained, distress or transportation company surplus merchandise; or misrepresenting, in any manner, the source, character or nature of the merchandise being offered for sale.

3. (a) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such merchandise has been sold or offered for sale in good faith at the former price by respondents for a

reasonably substantial period of time in the recent, regular course of their business.

(b) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise or services in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise at the compared price or some higher price.

(c) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in their trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise of like grade and quality.

4. Failing to maintain and produce for inspection or copying, for a period of three (3) years following the date on which any savings claims, sales claims, or other similar representations are made, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations as set forth in Paragraph Three of this order is based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

5. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise.

6. Making representations, directly or indirectly, orally or in writing, purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise or services but to obtain leads or prospects for the sale of other merchandise at higher prices.

7. Representing, directly or indirectly, orally or in writing, that any merchandise is offered for sale when such offer is not a bona fide offer to sell such merchandise.

8. Discouraging or disparaging, in any manner, the purchase of any merchandise which is advertised or offered for sale.

9. Failing to maintain and produce for inspection and copying for a period of three years following the date of publication of any

advertisement, adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price; and

c. a computation of the net profit from the sales of each advertised product or service at the advertised price.

10. Representing, directly or indirectly, orally or in writing, that any product is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and respondents deliver to each purchaser a written guarantee clearly setting forth all of the terms, conditions and limitations of the guarantee fully equal to the representations, directly or indirectly, orally or in writing, made to each such purchaser, and unless respondents promptly and fully perform all of their obligations and requirements under the terms of each such guarantee.

11. Representing, directly or indirectly, orally or in writing, that the supply of merchandise or the time during which it is available for sale is limited unless respondents establish that their supply of any article of merchandise advertised was not sufficient to meet reasonably anticipated demands therefor, and that their supply could not be replenished through their customary sources.

12. Failing to maintain and produce for inspection or copying for a period of three (3) years, adequate records from which compliance with the prohibition of Paragraph Eleven of this order can be determined.

It is further ordered, That respondents Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein, and Peter W. Galarneau, individually, and/or as copartners, trading and doing business as Freight Liquidators, or under any other trade name or names, and each of respondents' agents, representatives, and employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

B. Falsely and deceptively advertising textile products by:

1. Making any representations by disclosure or by implication, as to fiber content of any textile fiber product in any written advertisement which is used to aid, promote or assist, directly or indirectly, in the sale, or offering for sale, of such textile fiber product unless the same information required to be shown on the stamp, tag, label or other means of identification under Sections 4(b) (1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Failing to set forth in advertising the fiber content of floor covering containing exempted backings, fillings or paddings, that such disclosure relates only to the face, pile or outer surface of such textile fiber products and not to the exempted backings, fillings or paddings.

3. Using a fiber trade-mark in advertising textile fiber products without a full disclosure of the required fiber content information in at least one instance in said advertisement.

4. Using a fiber trade-mark in advertising textile fiber products containing only one fiber without such fiber trade-mark appearing at least once in the advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type.

It is further ordered, That respondents Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein and Peter W. Galarneau do forthwith cease and desist from disseminating, or causing the dissemination of, any advertisement of merchandise by means of newspapers, or other printed media, television or radio, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, unless respondents clearly and conspicuously disclose in each advertisement the following notice set off from the text of the advertisement by a black border:

> **We are subject to the prohibitions of a Federal Trade Commission Order in Docket 8937, that requires us to sell the products which we advertise without attempting to sell you a different item or a higher priced item.**

One year from the date this order becomes final or any time thereafter, respondents upon showing that they have discontinued the practices prohibited by this order and that the notice provision is no longer necessary to prevent the continuance of such practices may petition the Commission to waive compliance with this order provision.

It is further ordered, That each of said five respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of merchandise, or utilized in the advertising, promotion or sale of merchandise.

It is further ordered, That each of said respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of merchandise, or to advertise, promote, or sell merchandise, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That each of said respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That each of said respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale, sale of any product, or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That each of said respondents, promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the said respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

It is further ordered, That the complaint in this matter is dismissed as to respondents Sam Katz, George Edward Ommert, Gerald Gautcher and Mike McKeever with prejudice.

It is further ordered, That the complaint in this matter is dismissed as to Jerry M. Lytell without prejudice.

OPINION OF THE COMMISSION

FEBRUARY 25, 1975

BY THOMPSON, *Commissioner:*

The dedication of these respondents to the principles of truthful advertising is not particularly impressive. Indeed, the very name under which they do business- "Freight Liquidators"-misrepresents the nature of their operation and is a key part of the deceptive "concept" on which the organization was founded, namely, convincing consumers-contrary to the fact-that "distress" or surplus merchandise of good quality is being offered at bargain prices.

In an initial decision of June 27, 1974, our administrative law judge found (and respondents do not challenge these findings on appeal) that the business practices of Freight Liquidators have included (1) "bait and switch" tactics (advertising a low-price product as "bait" and then, when the customer tries to buy it, "switching" him to a higher priced item); (2) misrepresenting the sources of their merchandise; (3) misrepresenting the "savings" to be realized by purchasing their merchandise; (4) falsely claiming that their price offers were for a limited time only or that their goods were available in limited quantities only; (5) misrepresenting the nature and extent of the "guarantees" on their merchandise; and (6) failure to make certain disclosures required by the Textile Fiber Products Identification Act, 15 U.S.C. 70. These findings of extensive violations of law not being challenged on appeal, the only issue before us is the scope of the corrective order to be entered, particularly whether certain of the individual "partners" are to be held responsible and thus bound by its terms; whether an order provision dealing with the "adequacy" of the products sold is required; and whether, in respondents' future advertisements, a "warning" provision must be included.

The learned law judge has succinctly summarized the facts of the case in his findings. Joseph W. Green, who had been engaged in the sewing machine business in New York City until 1969, moved to the Washington, D.C. area in that year and began organizing a number of retail stores under the name Consumers Buying Service, a name that was changed to "Freight Liquidators" in 1971. Additional stores were opened from time to time, with Mr. Green as either the sole or part owner. In general, the fifteen (15) or more stores that traded under the Freight Liquidators name in the Washington and Baltimore areas during 1971 and 1972 were managed by one of Green's individual "partners," a part owner (with Green) who had invested a sum ranging from $3,000 to $25,000 in the store and who shared in its profits on the basis of that ownership interest. Mr. Green handled the purchasing end of the business and was also responsible for the preparation and placement of all advertising for the entire group of stores. Rugs, stereos, sewing machines, and other items were prominently featured in these advertisements, the thrust of which was (a) that respondents were engaged in the business of selling merchandise that was being "liquidated" for the payment of an indebtedness or claim, *i.e.*, bankrupt, salvage, distrained, distress, or transportation-company surplus goods, and (b) that the consumer, thanks to the unique or special character of this offered merchandise, could buy it at an especially low price, one reflecting significant savings from the price at which such goods are commonly sold at retail in the community in question. (See attached advertisements, CXF 4, 11, and 13[appearing at p. 304 herein].)

All of these claims are false. Freight Liquidators is not engaged in the business of selling bankrupt, salvage, distress, or transportation-surplus goods and the prices charged are not lower than those usually and customarily charged at retail. (Initial Decision, Finding 20, pp. 10-11.[p. 282 herein]) Nor were respondents' advertisements *bona fide* offers to sell at the advertised prices. They were designed, instead, primarily for the purpose of obtaining "customer leads," the opportunity to disparage the advertised products and "switch" the inquiring customer to merchandise bearing a significantly higher price than the one stated in the advertisement that had "baited" the customer into the store in the first instance. Respondents' salesmen, being compensated on the basis of a commission plan that was geared to the amount of *profit* realized on the sale (generally 25 percent of the profit made on each deal), typically diverted customers from the low-priced products featured in the advertisements by claiming the item was not available, by refusing to show it to the inquiring customer, or by displaying poor quality or unattractive samples of it. Thus a sewing machine with an advertised price of $58 or $63 turned out, upon inquiry, to include only a sewing machine *head*, omitting "such essentials as a base or stand containing the operating controls and without which the head of the machine was useless * * *." *Id.*, p. 12 [p. 284 herein]. The record is equally clear on the other misrepresentations found by the law judge and the failure to make the disclosures required by the Textile Act. *Id.*, p. 13[p. 284 herein].

The principal issues on appeal have to do, as noted, with (1) whether the order should include a "consumer warning" provision; (2) whether it should include a provision requiring respondents' merchandise to be "adequate" for its advertised purpose; and (3) whether certain individual respondents should be bound by the order as individuals.

STEREO

UNCLAIMED FREIGHT
BANKRUPTCY STOCK FACTORY CLOSEOUTS
TRUCK LOAD LIQUIDATION
All New Merchandise
LAST NOTICE FOR THIS WEEKEND
FRIDAY, SATURDAY, SUNDAY & MONDAY

ONLY $88
New 1972 (in cartons), 5-piece Stereo Component
Units, 40 Watts, AM/FM radio, deluxe
4 spd. BSR turntable, 4-speaker sound system,
equipped for 8 track tape player, tape recorder,
etc. Only $88
Only $147
New 5-piece Components 4-speed Deluxe Turn
Tbl., 100 watts, AM/FM radio, deluxe 4-spd.
turntable w/diamond stylus, 4-speaker air
suspension audio system. Equip. for 8-trk.
cassette. Orig. $329. Yours for $147

Only $108

New 1972 (in cartons), famous make, 100 watt
turners w/AM/FM multiplex equipped for 8 track
or cassette. Only $108

From Only $88
New console stereo, various sizes & finishes.
Lge. assortment w/AM/FM radio & deluxe 4 spd.
changer.

FREIGHT LIQUIDATORS
DEAL WITH THE STORE NEAR YOU* * *
(see CXF 4, CXF 11 and CXF 13)]

* * * * * *

On the first of these issues the law judge included in his order a provision that would require respondents to insert the following language in all of their advertisements for a minimum of one (1) year:[1] "We are subject to the prohibitions of a Federal Trade Commission Order in Docket 8937, that requires us to sell the products which we advertise without attempting to sell you a different item or a higher priced item." Counsel supporting the complaint argue for a more strenuous "consumer warning" provision[2] and respondents maintain that no such provision of any kind should be entered. While we agree that the instant record is insufficient to support an order provision of this kind, we will strike it here without prejudice to the right of the Commission to reopen these proceedings and add such a requirement if respondents' future conduct and/or changed circumstances should indicate that it is then required by the public interest. See *Wilbanks Carpet Specialists et al.*, Docket 8937 (Sept. 24, 1974 [84 F.T.C. 510]).

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[1] At the end of a year respondents would be permitted, under the law judge's order here, to petition the Commission for a waiver of further compliance with this provision upon a showing that they have discontinued the practice of "baiting and switching" their customers and hence that the restraint in question is no longer necessary. Initial Decision, p. 36 [p.300, herein].

We agree with the law judge's ruling that there is no need for a provision in his order prohibiting the advertising of merchandise that is "inadequate for the purposes for which it is offered."[3] This proposed provision was aimed chiefly at respondents' advertisements of low-priced "sewing machines" that turned out to be sewing machine *heads*, items that are not usable without the controls and other accessories that respondents charge "extra" for. Whether or not the word "inadequate" is unduly vague as found by the law judge, it is unnecessary. Another provision in his order prohibits any misrepresentation as to "the source, *character* or *nature* of the merchandise being offered for sale."[4] A sewing machine is not a sewing machine without the controls contained in the cabinet any more than an automobile is an automobile without an engine or a steering assembly. To advertise a sewing machine head as a sewing machine would thus be a misrepresentation of the "character or nature" of the product and hence a violation of this latter provision of the order.

The law judge dismissed the complaint as to six (6) of the individual respondents named in the complaint[5] but included five (5) of them in his cease and desist order, namely, Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein, and Peter W. Galarneau. Two of these individual respondents, Harold Green and John Green, argue on appeal that the order should not apply to them individually. Counsel supporting the complaint, on the other hand, contend that the law judge erred in not also including four (4) of the other individual respondents, Mike McKeever, Sam Katz, George Ommert, and Gerald Gautcher.

There can be no doubt of the deep personal involvement of two of these individual respondents in this deceptive scheme and thus the soundness of the law judge's decision in holding them individually liable. Joseph W. Green and Herbert Millstein were the principals in the organization and exercised authority and control in the setting of its deceptive advertising and sales policies.[6] Four of the others, Harold J. Green, John W. Green (sons of the founder, Joseph W. Green), Peter Galarneau, and Jerry Lytell,[7] exercised no control over the policies of the central Freight Liquidators organization itself (*e.g.*, its advertising policies) but each of them was involved in implementing the illegal scheme at more than one store location and hence was properly held liable by the law judge.

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[2] The wording proposed by complaint counsel is as follows: "The Federal Trade Commission has found that we engage in bait and switch advertising. That is, the salesman makes it difficult for you to buy the advertised product and he attempts to switch you to a higher priced item."

[3] See complaint counsel's proposed order, first paragraph, subparagraph 10.

[4] Paragraph 2 of the law judge's order. (Emphasis added.) Initial Decision, p. 28 [p.297, herein].

[5] The law judge had previously dismissed the complaint as to respondent Steven Rizzi by Summary Initial Decision, affirmed by the Commission in a final order of dismissal of Jan. 3, 1974. The complaint was dismissed as to give others—Mike McKeever, Jerry W. Lytell, George Edward Ommert (erroneously identified in the complaint and in a number of other pleadings as George Edward Ommeret), and Gerald Gautcher-in the law judge's later Initial Decision.

The more difficult issue concerns the individual liability of the four (4) respondents that the law judge declined to hold in his order, Katz, McKeever, Gautcher, and Ommert, all of whom he believed were more victims than perpetrators here primarily because of the questionable representations used to induce their participation in the plan.[8] While we share the law judge's concern with the welfare of those who have been induced to make a substantial investment in an unlawful scheme by false representations, one deception does not justify another. Each of these men managed one of the stores involved in this unlawful sales scheme, running the day-to-day operations of his own store and participating, either as a salesman himself or as a supervisor of salesmen, in the sale of this falsely advertised merchandise. A mere reading of these advertisements, together with knowledge of the true character of the merchandise and the terms on which it was in fact being sold, should be more than sufficient to put a reasonable and prudent businessman on notice that he had been made an active participant in a false and deceptive sales operation. These manager-owners can hardly be heard to deny that they *read* these advertisements for the products they sold and that the representations in these ads could not be squared with the factual situation they presided over in their own individual stores. Perhaps one can *join* the commercial equivalent of Quantrill's Raiders out of an innocent conviction that it is a religious or charitable organization but one cannot *remain* an uninformed member of it for long. These individual respondents were more than temporary guests at Mr. Green's table. They had made themselves members of the family.

The order of the administrative law judge will be modified in accordance with the foregoing and, as so modified, affirmed and adopted as the order of the Commission.

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[6] Initial Decision, p. 20 [p.291, herein].

[7] The law judge dismissed the complaint as to Mr. Lytell on the ground that he was an indigent and had not been furnished with counsel. We affirm that dismissal.

[8] *Id.*, p. 22 [p.293, herein].

CONCURRING OPINION OF COMMISSIONER LEWIS A. ENGMAN

FEBRUARY 25, 1975

BY ENGMAN, *Commissioner:*

I agree with Commissioner Hanford that we have the power to issue a "consumer warning" and that this remedy should not be used indiscriminately. I also agree that in the process of determining whether we should require a consumer warning, we should take into account a respondent's prior violations, as his prior conduct affords some evidence of proclivity to continue to engage in the prohibited practices.

However, I would not rest the decision to require a consumer warning solely on a respondent's proclivity to continue to violate the law. I would, in addition, take into account the Commission's ability to detect violations of the Commission's order under various circumstances. If we can readily monitor respondent's actions and institute compliance proceedings to cure violations, we may be able to provide adequate enforcement without the necessity of a consumer warning.

The instant order contains an effective means for monitoring respondent's conduct. Paragraph Nine requires respondent to retain records of the cost of publishing each advertisement and the sales volume of the advertised product. Thus, the Commission will have the data to determine whether respondent is expending substantial amounts of money advertising products which he rarely sells, usually a sign of bait and switch activity. Accordingly, I find it unnecessary to require a "consumer warning" in this case.

CONCURRING OPINION OF COMMISSIONER M. ELIZABETH HANFORD

FEBRUARY 25, 1975

BY HANFORD, *Commissioner:*

On four occasions in recent months the Commission has stricken a "consumer warning" provision from an order against a bait and switch retailer.[1] In each instance, the Commission indicated that it did not consider such a provision to be appropriate on the facts of the case. The record of this case, however, appears to present facts which differ significantly. These differences, in my view, merit serious consideration.

At oral argument Complaint Counsel alleged that respondent Joseph

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[1] Wilbanks Carpet Specialists, et al., Docket 8937 (Sept. 24, 1974 [84 F.T.C. 510]), Tri-State Carpets, Inc., et al., Docket 8945 (Oct. 15, 1974 [84 F.T.C. 1078]), Theodore Stephen Co., Inc., et al., Docket 8944 (Jan. 28, 1975 [85 F.T.C. 152]), Sir Carpet, Inc., et al. Docket 8981 (Feb. 6, 1975 [85 F.T.C. 190]).

W. Green signed an assurance of discontinuance with the State of New York in 1965 and a consent judgment at a later time, both involving bait and switch practices.[2] Counsel for Mr. Green not only confirmed that Green signed these two consent orders, but admitted that he had been criminally prosecuted for bait and switch advertising in the District of Columbia.[3] Thus, it would appear that this is at least the fourth time that legal sanctions have been imposed upon him as a result of alleged bait and switch conduct. In short, were we to accept the statements of counsel at oral argument, we could easily find Mr. Green to be a bait and switch recidivist.

As an adjudicatory body, however, we must proceed cautiously when considering matters not raised until oral argument. Since none of the prior judgments are a part of this record, and since the parties have not been given an opportunity to brief and argue fully the circumstances and effect of the prior judgments, we cannot properly consider these judgments in framing our order. Accordingly, I concur in the judgment of the Commission.

Had the record been more complete, however, I would not have hesitated to support an order including "consumer warning" relief of the kind ordered by the administrative law judge. Requiring a "consumer warning" is clearly within the power of the Commission; it is "reasonably related" to prohibiting further conduct found to have violated our Act.[4] When dealing with an individual who has repeatedly engaged in bait and switch practices, a consumer forewarned will be far less likely to fall victim to such practices.

Such a remedy should not be used indiscriminately. If the other order provisions were obeyed, there would be no need for a "consumer warning." Where dealing with a known recidivist, however, we may infer a significant likelihood that our order would be disobeyed. In such a case, it is my view that a "consumer warning" remedy may well be both appropriate and necessary.

FINAL ORDER

This matter is before us on cross-appeals by respondents, Herbert Millstein, Harold J. Green, John W. Green, Peter W. Galarneau, and Joseph W. Green, and by complaint counsel from the administrative law judge's initial decision filed June 27, 1974. For the reasons stated in the accompanying opinion, the Commission has determined to adopt the initial decision as the decision of the Commission except insofar as it is inconsistent with said opinion and to issue the cease and desist order contained therein as the final order of the Commission with the modifications set forth below. Accordingly,

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[2] Transcript of Oral Argument of Oct. 16, 1974, 18-19.

[3] *Id.* at 33-37.

[4] *Jacob Siegel Co.*, v. *F.T.C.*, 327 U.S. 608 (1946), *National Lead Co., et al.* v. *F.T.C.*, 352 U.S. 419 (1957).

It is ordered, That the law judge's cease and desist order be modified so as to include respondents Mike McKeever, Sam Katz, George Edward Ommert, and Gerald Gautcher in all provisions and that the paragraph dismissing the complaint as to said respondents be stricken;

It is further ordered, That the paragraph requiring respondents to include in their advertisements an affirmative disclosure to the effect that they are subject to a Federal Trade Commission order in Docket 8937 be stricken without prejudice to the Commission's right to reopen this proceeding to consider reinstating of this requirement or other appropriate relief should the future conduct of any of these respondents warrant such action,

It is further ordered, That in all other respects the appeals of respondents and complaint counsel be denied.

IN THE MATTER OF

REDMAN INDUSTRIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2640. Complaint, Mar. 3, 1975 - Decision, Mar. 3, 1975

Consent order requiring a Dallas, Tex., manufacturer of mobile homes, among other things to cease unfair and deceptive warranty practices through the establishment of a prompt and effective system to handle warranty-related problems. The order requires respondent to provide warranty repairs or services on still-unrepaired mobile homes manufactured between 1972 and 1974 and to provide future retail purchasers with relief by establishing and maintaining a regular and effective system to handle complaints and service. Under this system, all repairs must be complete within thirty days after notification to the respondent of defects. Where the defects affect safety or habitability of the mobile home, the repairs must be started within three business days and be expeditiously completed.

Appearances

For the Commission: *Walter E. Diercks, Robert Weinstock* and *Pamela B. Stuart.*

For the respondents: *Jerry L. Buchmeyer, Thompson, Knight, Simmons & Bullion*, Dallas, Tex.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Redman Industries, Inc., a corporation, and certain of its subsidiaries, (hereinafter referred to as respondents) have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint and the order attached hereto the term "mobile home" means a movable or portable dwelling over thirty two feet in body length and over eight feet in width, constructed to be towed on its own chassis and designed so as to be installed with or without a permanent foundation for human occupancy as a residence, which may include one or more components which can be retracted for towing purposes and subsequently expanded for additional capacity, or two or more units separately towable but designed to be joined into one integral unit. "Mobile home" as used herein includes the mobile home structure, including the plumbing, heating and electrical systems.

PAR. 2. Respondent Redman Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Redman Plaza East, 2550 Walnut Hill Lane, Dallas, Tex.

Respondent Redman Mobile Homes, Inc. is a wholly-owned subsidiary corporation of Redman Industries, Inc., organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Redman Plaza East, 2550 Walnut Hill Lane, Dallas, Tex. Respondent Redman Industries, Inc., dominates, controls, condones, approves and derives pecuniary benefits from the acts and practices of Redman Mobile Homes, Inc.

Respondent Redman Western Corporation is a wholly-owned subsidiary corporation of Redman Mobile Homes, Inc., organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at Redman Plaza East, 2550 Walnut Hill Lane, Dallas, Tex. Respondents Redman Industries, Inc. and Redman Mobile Homes, Inc. dominate, control, condone and approve the acts and practices of Redman Western Corporation.

PAR. 3. Respondents are now and have been engaged in the design, manufacture, advertising, offering for sale, sale and distribution of mobile homes to selected mobile home dealers. Manufacturing is accomplished in approximately 26 facilities controlled and operated by respondents, located in approximately 14 states.

PAR. 4. In the further course and conduct of their aforesaid business respondents are now and have been soliciting persons (individuals, partnerships and corporations) to become "authorized" dealers, and are also solicited by persons who desire to become "authorized" dealers. Respondents select certain of these persons as "authorized" dealers. In the normal course of business respondents sell and distribute the aforesaid homes only to these "authorized" dealers who then resell these products to the public. In the normal course of business the way in which the aforesaid homes are purchased new at retail unused by a first purchaser is through an "authorized" dealer.

PAR. 5. In the further course and conduct of their aforesaid business respondents place primary reliance on their "authorized" dealers to ascertain which of their aforesaid mobile homes contain defects which are subject to the aforesaid warranty, and to notify respondents of defects for which respondents assume responsibility. Respondents also place primary reliance on their "authorized" dealers to effect such repairs and services as are necessary to correct defects covered by the aforesaid warranty and to notify respondents of those defects covered by the aforesaid warranty which said dealers are unable or unwilling to fully correct, so that respondents may repair the aforesaid defects either directly with their own personnel or through the use of an independent service contractor.

PAR. 6. In the further course and conduct of their aforesaid business, respondents now cause and have caused, their mobile homes to be transported to "authorized" dealers located in various States of the United States and to be sold to retail purchasers by such dealers. Respondents therefore maintain and have maintained a substantial course of trade in said mobile homes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. In the further course and conduct of their aforesaid business respondents are now, and have been, orally or in writing, directly or through their dealers and others, granting or disseminating certain warranties or certain statements concerning their warranties to each retail purchaser of their aforesaid mobile homes by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act.

(a) Each written warranty represents directly or by implication that respondents will fully correct and repair within a reasonable period of time all defects in the materials or workmanship in each of their aforesaid mobile homes which become evident within a twelve month or ninety day period (depending on the character of the defect) subsequent to the date of their purchase at retail, except for certain specifically enumerated components, including but not limited to furniture and certain major appliances. Respondents' written warranty further represents that the aforesaid obligation is limited to repairing or replacing parts of their mobile homes which are returned to their nearest factory with transportation charges prepaid and which respondents shall determine to be defective, and that if it is impractical to send any part to the nearest factory, respondents shall have no liability for the labor cost involved in the repair or replacement but shall be liable solely for providing the necessary material for such repair or replacement.

Respondents' written warranty further purports to disclaim all other warranty rights which are imposed by force of law, including but not limited to the implied warranties of merchantability and fitness for a particular purpose, and represents directly or by implication that the aforesaid warranty sets forth the full extent of respondents' warranty obligations.

(b) Notwithstanding the foregoing, it is respondents' uniformly applied warranty policy that the aforesaid service and repair of defects covered by the written warranty will be provided at the mobile home site and that the return of the home, or the defective parts, as the case may be, with transportation charges prepaid is not a condition precedent to such performance.

PAR. 8. In the further course and conduct of their aforesaid business respondents have engaged in acts and practices which result in, and have resulted in, the failure to maintain an adequate, regular and effective system which assures that every retail purchaser of respondents' mobile homes in fact receives full service and repair of defects covered by the aforesaid warranty within a reasonable time.

Typical, but not inclusive of such acts and practices, are:

(a) The dissemination of a written warranty as described in Paragraph Seven which fails to disclose the true nature and extent of purchasers' warranty rights and those warranty obligations which respondents in fact undertake in the normal course of business, including but not limited to:

(1) the fact that pursuant to respondents' policies it is regarded as the "authorized" dealers' sole and complete responsibility, at least in the first instance, to perform repairs and service for certain classes of defects covered by the aforesaid warranty without compensation or reimbursement by respondents and without regular and effective action by respondents to determine whether such repairs and service are in fact fully performed within a reasonable time.

(2) the representation, made directly or by implication, that the aforesaid warranty is the sole legal warranty, that it legally excludes and disclaims all implied-in-law warranties, and that said warranty states the sole legal remedy available to the purchaser, when in truth and in fact under the applicable law of several states in which respondents' homes are sold at retail such exclusions, disclaimers or limitations are unenforceable.

(3) the representation, made directly or by implication, that as a condition precedent to securing full performance by respondents of their warranty obligations every party to whom the warranty is offered must complete properly and mail to respondents a certain owner's registration card at the time he or she purchases said mobile home, when in truth and in fact respondents' internal policy is to provide such performance irrespective of whether the card has been returned.

(4) the representation made directly or by implication that as a condition precedent to securing full performance by respondents of their warranty obligations every party to whom the warranty is offered must transport the defective part or if necessary the entire home to respondents' manufacturing plant, when in truth and in fact it is respondents' policy to provide such performance at the home site.

(b) the failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four are competent to perform warranty service or have made adequate arrangements for performing warranty service through independent contractors.

(c) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, notify respondents of the existence of claims initiated by retail purchasers for warranty service or for repair of defects covered by the aforesaid warranty.

(d) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, in fact fully perform and complete within a reasonable time all warranty service and repairs performed on behalf of respondents.

(e) the failure to establish and maintain an effective and regular mechanism for the prompt and fair resolution of mobile home consumer complaints and requests for service and repairs relating to respondents' warranty or warranty policies.

(f) the failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four, either directly or by action through independent contractors, are competent to perform a thorough inspection of a mobile home prior to its tender to a retail customer to determine whether a home contains defects covered by the aforesaid warranty.

(g) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, actually perform or assure the performance of a thorough inspection of a mobile home prior to its tender to a retail customer to determine whether a home contains defects covered by the aforesaid warranty.

(h) the failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four, either directly or by action through independent contractors, are competent to perform the installation or "setup" of the aforesaid mobile homes at the homesite selected by the retail purchaser.

(i) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, actually and competently perform the installation or "setup" of the aforesaid mobile homes.

(j) the failure to maintain an adequate and expert factory service capability or to make other provisions adequate to assure the full performance within a reasonable time of the repair of defects covered by the aforesaid warranty which respondents' "authorized" dealers are unwilling or unable to perform.

The aforesaid failure to maintain a regular and effective system which assures the full performance within a reasonable time of service and repair of defects covered by the aforesaid warranty has the capacity or tendency to impede, delay or prevent the performance of said service and repairs for parties to whom the warranty is offered.

PAR. 9. By and through the aforesaid acts and practices respondents have been and are now:

(a) Disseminating a warranty which fails to fully and completely inform purchasers as to the actual protection offered by respondents.

(b) Failing to establish or maintain an effective or adequate system which assures that respondents will fully correct or repair all defects covered by the aforesaid warranty within a reasonable time.

The aforesaid acts and practices are deceptive and are in violation of Section 5 of the Federal Trade Commission Act.

PAR. 10. By such failure to maintain a regular and effective system which assures that every party to whom the warranty is provided will receive full performance within a reasonable time of the service and repair of defects covered by the aforesaid warranty respondents have been and now are engaged in unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 11. Through the individual and cumulative acts and practices set forth in Paragraph 8(a) respondents are now and have been disseminating and causing the dissemination of a written warranty which fails to fully and accurately describe the true nature and extent of the warranty rights of retail purchasers of respondents' mobile homes and those warranty obligations which in fact respondents undertake in the normal course of business. Thus respondents have failed to disclose material facts which if known to consumers:

(a) would be likely to affect their decision of whether to purchase one of respondents' mobile homes, and

(b) would enable retail purchasers to understand the true nature and extent of their warranty rights and to secure performance of such warranty service.

Therefore, the aforesaid failures to disclose material facts are deceptive and unfair and are in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Redman Industries, Inc. is a corporation organized,

existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Redman Plaza East, 2550 Walnut Hill Lane, Dallas, Tex.

2. Respondent Redman Mobile Homes, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Redman Plaza East, 2550 Walnut Hill Lane, Dallas, Tex.

3. Respondent Redman Western Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Redman Plaza East, 2550 Walnut Hill Lane, Dallas, Tex.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

1. *It is ordered*, That respondents shall within 90 days from the effective date of this order make a written inquiry of all known retail purchasers of respondents' mobile homes (except those specifically excluded below) built between July 1, 1972 and June 30, 1974, utilizing the form of letter shown in Appendix A attached hereto and made a part hereof which shall contain therein a self-addressed postage paid return envelope, and which shall be mailed to such purchasers by first class mail.

Known retail purchasers are defined as those first purchasers at retail of said mobile homes who communicate with respondents no later than 60 days after the effective date of this order and those first retail purchasers whose names and addresses (1) are contained in company "coach" or unit files and tire records (except that with respect to respondents' manufacturing plants which maintained for the period July 1, 1972 to June 30, 1974 separate files for warranty registration cards the names and addresses of known retail purchasers may be established from such separate files rather than by reference to "coach" or unit files), (2) are supplied by the Federal Trade Commission within 60 days of the effective date of this order or; (3) are supplied to respondents by respondents' past and current dealers in response to respondents' letter request for such information sent by first class mail, (which letters shall be sent no later than 30 days after the effective date of this order) utilizing the form of letter shown in Appendix B attached hereto and made a part hereof and which shall contain therein a self-addressed postage paid return envelope.

Notwithstanding the above, known retail purchasers shall not include:

(a) local, State or Federal Governments or agencies thereof;

(b) retail purchasers who are now or have been engaged in litigation with respondents involving their mobile home built by respondents during the two year period set forth hereinabove;

(c) retail purchasers whose homes were sold to them on an "as is" basis;

(d) retail purchasers who communicated directly with respondents' corporate headquarters or its attorneys concerning a problem or defect in such purchaser's mobile home, where there is a record indicating a resolution of the problem to the purchaser's satisfaction;

(e) retail purchasers whose names are supplied by past or current dealers in response to respondents' written inquiries set forth hereinabove when such names are received by respondents from a dealer more than sixty days after respondents' inquiry was mailed to that dealer unless the purchaser or purchasers themselves communicate with respondents no later than 60 days after the effective date of this order, or the name or names of such purchaser or purchasers appear elsewhere in respondents' individual "coach" or unit files or tire records, (or where applicable, warranty registration card files) or were supplied to respondents by the Federal Trade Commission as set forth hereinabove;

(f) retail purchasers who live outside the United States or who purchased mobile homes from dealers located outside the United States;

(g) retail purchasers who are known to respondents to no longer own their mobile homes built by respondents.

2. *It is further ordered*, That respondents shall, directly or through their dealers or other third parties, repair or service within a reasonable time at the site of the home (in the normal course not to exceed ninety days from the date on which the letter to a given retail purchaser referred to in order Paragraph 1 is returned and received by respondents) all defects and malfunctions in mobile homes produced by respondents during the two year period referred to hereinabove which become known pursuant to order Paragraph 1 unless it is clear that a given defect or malfunction:

(a) is a result of improper setup of the mobile home;

(b) is a result of improper use or abuse of the mobile home;

(c) did not arise or become evident within the term of the warranty;

(d) was brought to respondents' attention by a retail purchaser more than sixty days after respondents mailed the written inquiry to such purchaser as provided hereinabove where the home was purchased by the first retail purchaser more than one year prior to the effective date of this order;

(e) is a minor cosmetic defect in a home purchased by the first retail purchaser more than one year prior to the effective date of this order.

3. *It is further ordered*, That respondents cease and desist from disseminating, or causing the dissemination of, offering or otherwise providing, in commerce, any express warranties to the retail purchasers of respondents' mobile homes unless respondents meet all of their obligations under such warranties within the time period standards set forth hereinbelow in order Paragraph 3(e) and establish and maintain a regular and effective system reasonably designed to assure that every purchaser of the aforesaid mobile homes will receive full performance by respondents, directly or by action through their dealers or other third parties, of all such warranty obligations within the said time period standards. This warranty performance system shall incorporate but not necessarily be limited to the following standards and terms:

(a) Respondents shall disseminate a warranty and associated documents which clearly and fully describe and effectively communicate to the first retail purchaser:

(1) the identity and address of the warrantor;

(2) the nature and extent of the warranty offered or otherwise provided;

(3) the remedies available to the purchaser under the warranty;

(4) the manner in which respondents intend to provide for performance of their warranty obligations, including disclosure of any delegation of warranty responsibility to third parties, *Provided, however*, That disclosure of said delegation must be accompanied by additional disclosure that such delegation in no way relieves respondents of the ultimate responsibility to fulfill all of respondents' warranty obligations;

(5) any and all requirements which must in fact be fulfilled by the purchaser as a condition precedent to securing performance by respondents of their warranty obligations;

(6) a uniform procedure to be followed by a purchaser in order to request performance by respondents of their warranty obligations;

(7) a uniform procedure available to the purchaser for a systematic review and disposition of complaints and disputes with respect to the performance of respondents' warranty obligations by respondents' manufacturing plants, subsidiaries, divisions, and other employees, or by respondents' dealers or other third parties.

(b) Respondents shall cease and desist from selling their mobile homes without any express or implied warranty, *i.e.*, "as is," or with any disclaimer of implied warranties or limitations or exclusion of liability under any warranty or disseminating or causing the dissemination of any statement or representation which represents, directly or by implication, that respondents have disclaimed any express or implied warranty or limited or excluded any liability under any warranty unless respondents have a reasonable basis in the form of an opinion by legal counsel that said disclaimers, limitations and exclusions are enforceable under governing state law, and clear and conspicuous notice of said "as is" sale or other said disclaimer, limitation or exclusion is given to prospective retail purchasers of their mobile homes prior to the execution of the contract of retail purchase. A clear and conspicuous notice of an "as is" sale shall contain the following language:

NOTICE:

The manufacturer of this mobile home sells it "as is" and refuses to assume any responsibility for defects. The purchaser of this mobile home must accept it with all defects and take the entire risk, under contract law, as to its condition.

Provided however, That with respect to: (a) the "as is" sale of damaged, salvaged, demonstrator or repossessed mobile homes, (b) the sale of mobile homes where respondents disclaim or fail to grant an express warranty on appliances which are covered by a separate written warranty by a supplier or manufacturer other than respondents, and (c) the "as is" sale of mobile homes to local, State and Federal Governments or agencies thereof, the aforesaid opinion by legal counsel shall not be required.

(c) All of respondents' warranty service and repair obligations performed subsequent to the tender of the home to the retail purchaser shall be rendered by respondents, directly or through their dealers or other third parties, at the site of the mobile home.

(d) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealers or any other persons not employees of respondents to:

(i) determine whether any mobile home manufactured by respondents contains defects which are within the scope of a warranty extended by respondents or otherwise requires remedial action pursuant to said warranty;

(ii) notify respondents of the existence of those circumstances enumerated in subparagraph (d)(i) above; or

(iii) perform any repairs or otherwise provide services in satisfaction of any warranty obligations incurred by respondents, respondents shall, beginning within 120 days of the effective date of this order, assure that if a dispute or disagreement should arise between respondents and one or more of said dealers or other third persons as to which of them is to incur any such duty, burden or responsibility with respect to warranty repairs and service or is to correct a malfunction related or alleged to relate to setup of the aforesaid mobile homes, any and all necessary repairs or other corrective action will be expeditiously provided (in the normal course of business) in a manner consistent with this order, regardless of whether the said dispute or disagreement has been resolved. The "normal course of business" does not include:

(1) conditions under which abnormal demands are made upon service capabilities as a result of natural disasters, other acts of God or the government (including the effects of remedial action required of respondents as set forth in order Paragraphs 1 and 2, above), or any other event beyond the control of respondents and their dealers which places an unusually large demand upon service facilities;

(2) conditions resulting from disasters, strikes, acts of the government, instances of force majeure or other similar occurrences which are beyond the control of respondents and their dealers and which prevent respondents and their dealers from responding to service requests within the time periods stated hereinbelow;

(3) slight omissions or deviations from the terms of this order which are inadvertent, unintentional, and not due to bad faith of respondents;

(e)(1) Respondents shall, beginning within 120 days of the effective date of this order, directly or through their dealers or other third parties, commence, in the normal course of business as set forth in order Paragraph 3(d) above, all warranty service or repairs of defects giving rise to a condition which affects the safety of a mobile home or renders it substantially uninhabitable, as soon as possible but in no event later than three business days following receipt of notice of such defect by respondents from the retail purchaser, or two business days following notice of the determination made by respondents' dealer pursuant to order Paragraph 3(i)(3)(iii) below, and shall complete such service or repairs expeditiously.

(2) Respondents shall, except as set forth in order Paragraph 3(e)(1) above, beginning within 120 days of the effective date of this order, directly or through their dealers or other third parties, in the normal course of business, as set forth in order Paragraph 3(d) above: (a) respond to notice of the need for warranty service or repairs within a reasonable time not to exceed seven business days of receipt of said notice by respondents or their dealers and (b) complete said service or repairs within a reasonable time not to exceed thirty days following said receipt of notice.

(3) *Provided, however*, That in the event of a bona fide dispute between respondents or their dealers and a retail purchaser requiring resolution through the procedure established pursuant to order Paragraph 3(m) below, as to whether the defect(s) complained of by the retail purchaser are or are not covered by respondents' warranty, then: In the event it is determined that warranty service or repair is

required, which determination shall be made promptly, respondents shall be allowed, in the normal course of business as set forth in order Paragraph 3(d) above, from the date of notification of the dispute as set forth in this subparagraph (e)(3) no more than three business days in the case of defects referred to in subparagraph (e)(1) above to commence service or repair (such repairs to be completed expeditiously), and no more than thirty days in the case of defects referred to in subparagraph (e)(2) above to complete service or repair.

(f) Respondents shall, except as provided in order Paragraph 3(h) below, in the normal course of business as set forth in order Paragraph 3(d) above, beginning within 120 days of the effective date of this order, inspect at the home site, directly or through their dealers or other third parties, each mobile home prior to or at the time of tender of possession to the retail purchaser to assure that the home is being delivered to such purchaser free of all ascertainable defects and is properly setup, except for deficiencies which do not affect the home's safety or habitability, which shall be noted in the owner-dealer final delivery checklist (Appendix C), and which shall be then remedied in accordance with subparagraph (e)(2) above.

(g) Respondents shall, except as provided in order Paragraph 3(h) below, in the normal course of business as set forth in order Paragraph 3(d) above, beginning within 120 days of the effective date of this order, reinspect, directly or through their dealers or other third parties, each mobile home on or about sixty days after tender of possession to the retail purchaser to determine the existence of and to correct or arrange for the correction of any defects, covered by respondents' warranty, in the mobile home, or improper setup and problems arising therefrom.

Results of each of the inspections required in order Paragraphs 3(f) and 3(g) hereinabove will be documented in a report or reports which shall be required to be signed by respondents' dealer and if possible by the retail purchaser or said purchaser's representative, indicating agreement with the information set forth therein. The reports documenting the results of the aforesaid inspections shall be in the formats set forth in Appendices C and D attached hereto, or in formats substantially equivalent thereto.

(h) If the retail purchaser elects to provide for the setup of his mobile home himself, then in such cases the responsibility of respondents and their dealers for transportation, setup, inspection and reinspection, as set forth in subparagraphs (f) and (g) above, shall terminate with the delivery or tender of possession to the retail purchaser or his agent or representative.

(i) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealers to perform the duties set forth in order Paragraph 3(d) above, respondents shall enter into written contractual agreements with such dealers which:

(1) adequately and accurately describe the scope of those duties to be borne by said dealers as aforesaid, as well as the responsibility for properly setting up respondents' mobile homes;

(2) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) to provide respondents with the name and address of each retail purchaser and the date of each purchase;

(3) (i) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i), to commence all warranty service, or repair of defects, giving rise to a condition which affects the safety of a mobile home or renders it substantially uninhabitable as soon as possible but in no event later than three business days following receipt by the dealer of notice of such defect or condition and to complete such service or repairs expeditiously;

(ii) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i), to complete all other warranty service or repairs within a reasonable time, not to exceed thirty days following receipt by the dealer of notice of such condition;

(iii) set forth that the requirements of subparagraph (i)(3)(i) and (i)(3)(ii) above shall apply only to those cases in which the dealer responds to and completes the service or repairs himself. In those cases in which the dealer determines to rely upon respondents to perform or to complete service or repairs requested by retail purchasers under:

(a) subparagraph (i)(3)(i) above, such determination shall be made and communicated to respondents as soon as possible but in no event later than two business days after dealer's receipt of notice from the retail purchaser.

(b) subparagraph (i)(3)(ii) above, such determination shall be made and communicated to respondents as soon as possible but in no event later than five business days after the dealer's receipt of notice from the retail purchaser.

(4) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) to inspect each mobile home prior to or at the time of tender of possession to the retail purchaser as set forth in order Paragraph 3(f), except as provided in subparagraph (h) above, to assure that the home is being delivered to such purchaser free of all ascertainable defects and is properly set up, except for deficiencies which do not affect the home's safety or habitability which shall be noted in the owner-dealer final delivery checklist (Appendix C) and which shall then be remedied in accordance with subparagraph (i)(3)(ii) immediately above.

(5) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) except as provided in subparagraph (h) above to reinspect each mobile home on or about sixty days after tender of possession to the retail purchaser to determine the existence of and to correct or arrange for the correction of any defects in the mobile home covered by respondents' warranty or improper setup and problems arising therefrom;

(6) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) to provide respondents with reports which will document the results of the inspections set forth in (4) and (5) immediately above and which will be signed by respondents' dealer and if possible by the retail purchaser or said retail purchaser's representative indicating agreement with the information set forth therein;

(7) provide for a procedure which assures that if a dispute or disagreement should arise between respondents and one or more of said dealers as to which of them is to incur any such duty, burden or responsibility or is to correct an improper initial setup or a malfunction arising therefrom, any and all necessary repairs or other corrective action will be expeditiously provided, regardless of whether the said dispute or disagreement has been resolved;

(8) establish the duty of the dealer to maintain or contract for adequate service personnel and facilities;

(9) set forth service responsibilities in the event of termination of a dealer with respect to homes still under warranty or in the possession of the dealer and not yet sold to a retail purchaser at the time of termination;

(10) set forth the right of respondents to withdraw authorization from dealers failing to meet their responsibilities under the agreement.

Existing dealers authorized by respondents as of the effective date of this order shall execute such agreements (which agreements shall be immediately effective) within 180 days of the effective date of this order, or shall be terminated by respondents. Other dealers authorized by respondents later than the effective date of this order shall execute such agreements at the time of their authorization.

Such agreement shall be in the format set forth in Appendix E attached hereto or in a format substantially equivalent hereto.

The "normal course of business" as used in this order Paragraph 3(i) shall not include: (1) conditions under which abnormal demands are made upon service capabilities as a result of natural disasters, other acts of God or the government, or any other event beyond the control of the dealer which places an unusually large demand upon the dealer's service facilities; (2) conditions resulting from disasters, strikes, acts of the government, instances of force majeure or other occurrences which are beyond the control of the dealer which prevent the dealer from responding to service requests within the time periods stated hereinabove; (3) slight omissions or deviations from the terms of this order subparagraph which are inadvertent, unintentional and not due to bad faith of the dealer.

(j) Respondents shall send a questionnaire (using the format set forth in Appendix F attached hereto or in a format substantially equivalent thereto) to all persons other than "as is" purchasers who after the effective date of this order purchase at retail respondents' mobile homes which inquires as to:

(1) the existence of any defects in said mobile homes covered by respondents' warranty or improper setup or problems arising therefrom;

(2) whether the retail purchaser notified anyone of such defects or setup problems, and if so who was notified and when did such notification take place;

(3) the identity of any person who sought to service such defects or setup problems;

(4) whether such defects or setup problems were fully repaired, the period of time required to effect such repairs, and the identity of the parties who accomplished such repairs;

(5) whether the retail purchaser is satisfied with the promptness and quality of the repair.

Such questionnaire in the form of a postage paid self-addressed post card or a letter containing a postage paid self-addressed envelope, shall be sent between sixty and ninety days subsequent to the tender of possession of the home to the retail purchaser.

(k) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealer or any other persons not employees of respondents to perform any of the responsibilities or duties set forth in order Paragraph 3(d) hereinabove, respondents shall fully evaluate the level of expertise and physical and personnel resources of such dealers or other persons with respect to the ability to inspect, repair, service and setup all mobile homes manufactured by respondents prior to such delegation or reliance to assure that all said persons are capable of performing said responsibilities or have provided for such performance through a third party having such capability, in accordance with the standards set forth herein.

Respondents shall in addition regularly review and evaluate the manner in which such persons, directly or through another third party, perform the aforesaid responsibilities and maintain their service capabilities and shall withdraw said reliance and authorization from persons failing to meet those responsibilities or the standards set forth herein.

(l) The direct administration of respondents' warranty service program at the corporate level and the responsibility for supervising and assuring implementation of the warranty service program shall, beginning within 120 days of the effective date of this order, be vested in only those corporate officials who have no direct responsibilities on a day-to-day basis for the sale of respondents' mobile homes. The person or persons to whom the responsibility for supervising and assuring the implementation of the program is delegated shall make periodic reports at least on a monthly basis to respondents' responsible officers which shall include current information concerning:

(1) the current cost to respondents of warranty service;

(2) the incidence and nature of frequently recurring defects;

(3) those measures undertaken in response to reports of frequently recurring defects including but not limited to modification in production and design of respondents' mobile homes;

(4) analysis of the manner in which respondents' employees, dealers and other third parties are performing warranty and setup responsibilities.

(m) Respondents shall, beginning within 120 days of the effective date of this order, establish a uniform procedure for the systematic receipt and analysis and fair disposition of all complaints or disputes which may arise between the aforesaid retail purchasers of respondents' mobile homes and respondents or respondents' dealers or other third parties, regarding any alleged warranty obligations of respondents.

Such procedure shall incorporate but not necessarily be limited to:

(1) prompt evaluation and response by respondents to all complaints within a reasonable time not to exceed five business days after receipt by respondents;

(2) the designation of a single focal point within the corporation for the receipt of said complaints;

(3) an effective mechanism for the fair and impartial resolution of such disputes by corporate level personnel not responsible for sales on a day-to-day basis;

(4) an accurate and complete record keeping system regarding the nature and disposition of all such disputes and complaints received by respondents;

(5) periodic review and evaluation by respondents of the effectiveness of such procedures and correction of such procedures where necessary.

(n) Respondents shall, beginning within 120 days of the effective date of this order, maintain full and adequate records which disclose:

(1) the date of receipt, disposition and the date of disposition of each request for warranty service (including any refusal to accept a request and the reason for such refusal) received by respondents; and

(2) the results of the evaluation of service capacity provided for in order Paragraph 3(k) above.

4. *It is further ordered*, That respondents shall forthwith distribute a copy of this order to each of their operating divisions or manufacturing plants engaged in the manufacture, offering for sale, sale, and distribution of mobile homes.

5. *It is further ordered*, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in the corporations which may affect compliance obligations arising out of this order.

6. *It is further ordered*, That respondents shall, at intervals of 9, 18, and 24 months following the effective date of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order. Such reports shall include but not be limited to the periodic reports submitted to respondents' responsible officers described in order Paragraph 3(l) above.

7. *It is further ordered*, That respondents shall furnish to the Commission nine months after the effective date of this order, a report which discloses the dates and manner in which dealers and retail purchasers were contacted pursuant to the procedures described in order Paragraph 1 above, and the dates and manner in which dealers and retail purchasers acted in response thereto and the dates and manner in which respondents acted in response to allegations by retail purchasers which purported to create an obligation on the part of respondents under the terms of order Paragraph 2 above. Respondents shall for a period of two years after the effective date of this order maintain records which are adequate to disclose respondents' compliance with order Paragraphs 1 and 2, in order that such records may be furnished by respondents to the Federal Trade Commission upon request.

8. *It is further ordered*, That respondents shall submit to the Federal Trade Commission for its review copies of any proposed substantial revisions in the questionnaire required pursuant to order Paragraph 3(j), the dealer agreement required pursuant to order Paragraph 3(i), and the warranty documents described in order

Paragraph 3(a), at least 60 days prior to the proposed effective date of any such revisions. Such submissions will be required for the three years following the effective date of this order.

APPENDIX A

(Date)

Dear Mobile Home Owner:

Thank you for purchasing one of Redman's family of mobile homes. Our homes are warranted to be free from defects in material and workmanship. Any repairs required by your warranty should have been performed in full by the dealer who sold you your home or, if this was not possible, by the factory which manufactured it. Through the following questionnaire, we are seeking to determine your experience with regard to service so that we may be sure you have received full performance of warranty obligations. Your response to the following questions will enable us to provide you with the warranty service to which you are entitled.

Please respond to the following questions and return this letter in the enclosed postage-paid envelope.

(1)(a) Have you experienced problems with your mobile home that you feel are covered by our warranty described above (check one) yes no

(1)(b) If the answer to (1)(a) is yes, please tell us *when* the problems occurred and *describe* them ________________

(2) If you have experienced problems that you feel are covered by our warranty, please advise us of *whom* you contacted and *when* the contact was made. ________________

(3)(a) If you contacted someone regarding a warranty problem, was the problem corrected (check one) yes no

(3)(b) If the answer to 3(a) was yes, please indicate *how long* it took to correct the problem, and *who* performed the repair: ________________

3(c) If the answer to 3(a) was No, does the problem still exist (check one: _____ yes _____ no

3(d) If the answer to 3(c) was Yes, please describe the current condition of the problem and any attempts at correction you have made: ________________

4(a) If warranty service was provided, were you satisfied with (1) the promptness of repairs (check one) _____ yes _____ no (2) the quality and completeness of repairs (check one) _____ yes _____ no

4(b) If your answer to 4(a)(2) was No, does the problem which was the subject of warranty service still exist (check one): _____ yes _____ no

4(c) If your answer to 4(b) was yes, please explain and describe the current condition of the problem and any attempts at correction you have made: ________________

5(a) Who performed the set-up or installation of your mobile home? (Name) (relationship) dealer, park operator, independent contractor, etc. (location)

5(b) Has there been any doubt or dispute as to whether a problem you have experienced with you mobile home was a problem covered by your warranty or due to improper set-up or installation (check one) _____ yes _____ no

5(c) If the answer to 5(b) was Yes, does the problem still exist (check one): _____ yes _____ no

5(d) If the answer to 5(c) was Yes, please describe the current condition of the problem and any attempts you have made to get the problem corrected: ________________

5(e) Are you satisfied with the manner in which your mobile home was set-up or installed (check one): _____ yes _____ no

(6) Please advise us of any suggestions that you might have that will enable us to increase the quality, utility, and value that we strive to build into our homes.

Note: Below is your name and address as they appear in our records, if there is need for a correction, please make it in the space provided. Also we ask that you supply us with your telephone number in the space provided as it will facilitate our reaching you to discuss any problems with our product or service that you have pointed out:

(Name of Customer) ________________

(Street address) ________________

(City, State, Zip) ________________

telephone number (including area code): ________________

We thank you for responding to the questions set forth above. Please return this letter to us in the enclosed postage paid envelope.

Sincerely,

APPENDIX B

Letters to Dealers Requesting Names and Addresses of Past Purchasers

Dear ________________

Pursuant to an agreement with the *Federal Trade Commission*, Redman Industries is securing from each of its present and former dealers all names and addresses of retail purchasers of its mobiles homes built between July 1, 1972 and June 30, 1974, identified with Serial Numbers ________________ through ________________. Dealer submission of these names and addresses is necessary since warranty registration cards fail to provide the information for a substantial number of homes.

Please fill in the names and addresses of the retail purchasers of these units and serial numbers of the homes and return this letter in the postage paid envelope provided before ________________, 1974, as called for by the above agreement.

Signed ________________,

Plant General Manager

Serial Numbers	Names and Addresses	

appendix C

REDMAN MOBILE HOMES, IN

Pre-Occupancy Check Out

Serial No. ______ Brand Name ______ ______ Model No. ______

Dealer Name: ______

Address: ______

City: ______ State: ______ Zip: ______

Phone Number: A/C (   ) ______

Date Unit Delivered to Retail Purchaser: ______

Retail Purchaser's Name: ______

Address: ______

City: ______ State: ______ Zip: ______

Phone Number: A/C (   ) ______

The above Dealer and Retail Purchaser is to make an X in the respective blocks below, before all subects and items (i.e., parts, systems, components, accessories or booklets in, attached to, incorporated into or related to this unit) to indicate and certify that each item or subject was appropriately covered, included, inspected and/or actually tested by this Dealer and as a result was found to perform, function, operate and/or serve as intended by its respective manufacturer, on or before the unit was delivered to the Retail Purchaser.

For items listed but not in or on this unit, write N/A in blocks.

LP NATURAL GAS AND OIL SYSTEMS:

Customer Dealer

- ☐ ☐ After gas appliances are connected, unit's gas piping system must be pressure tested with all appliance-burner valves closed. Such test will consist of pressurizing entire system not less than ten minutes (10 minutes) without showing any drop in pressure. The system was pressurized to not less than ten inches (10") nor more than fourteen inches (14") water column and appliance connections were tested for leakage with soapy water or bubble solution. Before beginning air pressure test, temperature of gas piping system and test air was equalized. NOTICE: Other type test may be required due to local code or a licensed gas representative to perform gas check. Note if applicable.
- ☐ ☐ Before lighting furnace, make sure flue pipes were tight and in place. (Failure to do so can result in lethal furnace exhaust fumes not being properly vented.)
- ☐ ☐ Furnace (Pilot and Burner)
- ☐ ☐ Range (Pilot and Burner)
- ☐ ☐ Water Heater (Pilot and Burner)
- ☐ ☐ Gas Dryer

WATER SYSTEMS:

- ☐ ☐ Fresh Water Intake
- ☐ ☐ Water Supply Lines
- ☐ ☐ Faucets
- ☐ ☐ Shower Over Bath
- ☐ ☐ Traps
- ☐ ☐ Gate Valve
- ☐ ☐ Toilet Stool and Tank
- ☐ ☐ Drain Cocks and Connections
- ☐ ☐ Hot Water Heater
- ☐ ☐ Separate Shower/Stall

ELECTRICAL SYSTEMS:

Customer Dealer

- ☐ ☐ Panel Box properly labeled and fused
- ☐ ☐ Circuit Breaker Box — 100 AMP, 150 AMP, 200 AMP. NOTE: Local code may require licensed electrician to run power to home. Note if applicable. Include name of electrical company.
- ☐ ☐ Electric Water Heater
- ☐ ☐ Electric Range / Eye Level Oven Counter Top
- ☐ ☐ Electric Dryer
- ☐ ☐ Electric Furnace
- ☐ ☐ Electric Washer
- ☐ ☐ Air Conditioner
- ☐ ☐ Refrigerator
- ☐ ☐ Garbage Disposer
- ☐ ☐ Dishwasher
- ☐ ☐ Receptacles
- ☐ ☐ Interior Fans
- ☐ ☐ Interior Switches
- ☐ ☐ Interior Lights
- ☐ ☐ Furnace Thermostat
- ☐ ☐ Exterior Receptacle
- ☐ ☐ Exterior Lights
- ☐ ☐ Compactor

INTERIOR:

- ☐ ☐ Smoke Detectors/Installed
- ☐ ☐ Heat Registers
- ☐ ☐ Wall Paneling
- ☐ ☐ Ceilings
- ☐ ☐ Beds and Mattresses
- ☐ ☐ Loose Living Room Furniture
- ☐ ☐ Dinette Furniture
- ☐ ☐ Bedroom Furniture
- ☐ ☐ Mirrors

Customer Dealer

- ☐ ☐ Tub or Shower Enclosure
- ☐ ☐ Light Globes and Shades
- ☐ ☐ Door Knobs, Latches, Hinges, Stricker Plates
- ☐ ☐ Cabinet Doors, Door Pulls, Latches, Hinges
- ☐ ☐ Closet Doors, Latches, Hinges, and Hardware and Adjustment of Such Explained
- ☐ ☐ Carpet, Linoleum
- ☐ ☐ Curtains
- ☐ ☐ Window Closings, Cranks, and Fitting
- ☐ ☐ Storm Windows
- ☐ ☐ Trim Mouldings
- ☐ ☐ Retail Purchaser was properly instructed on how to operate all of unit's appliances, features with operational and service manual for range, air conditioner, refrigerator, furnace, washer, dryer, dishwasher, disposal

EXTERIOR:

- ☐ ☐ Drip Caps over Exterior Doors
- ☐ ☐ Entrance Door(s) lock and fit with all required keys
- ☐ ☐ All Window Screens
- ☐ ☐ Roof
- ☐ ☐ Exterior Metal
- ☐ ☐ Vents
- ☐ ☐ Shutters and Trim
- ☐ ☐ Coupler Hitch Assembly
- ☐ ☐ Tires and Axles
- ☐ ☐ Copy of Owner's General Maintenance and Guide Booklet
- ☐ ☐ Copy of Dealer and Manufacturer Warranty
- ☐ ☐ Hurricane Tie Down Straps
- ☐ ☐ Egress Windows
- ☐ ☐ Crossover Systems—Double Wide

The above pre-occupancy check out/inspection requirements and obligations have been performed by this Dealer and this unit is considered by the Dealer and Purchaser to be completely habitable, stable, and acceptable for delivery to the Retail Purchaser on this date.

______ Signature of Dealer or Authorized Representative Date

______ Signature of Retail Purchaser Date

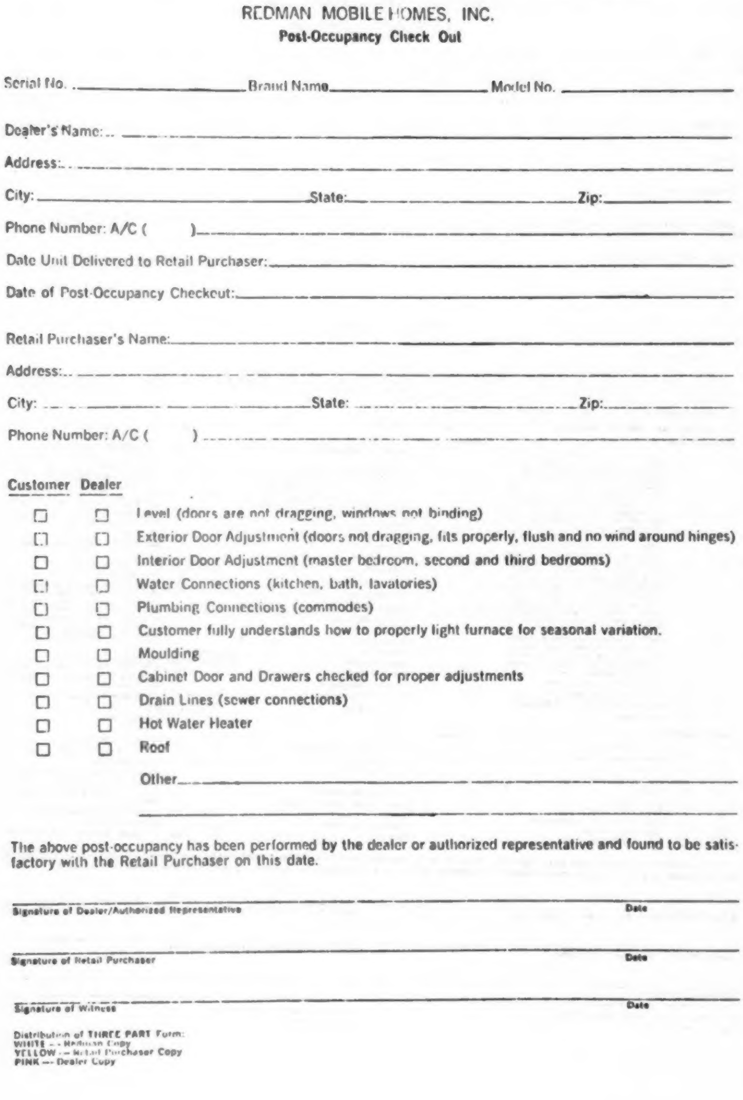
______ Type or Print Full Name of Above Signee

______ Type or Print Full Name of Retail Purchaser

______ Signature of Witness Date

DISTRIBUTION OF THREE PART FORM:
WHITE — Redman Copy
YELLOW — Retail Purchaser Copy
PINK — Dealer Copy

APPENDIX D



REDMAN MOBILE HOMES, INC.
Post-Occupancy Check Out

Serial No. ____________ Brand Name ____________ Model No. ____________

Dealer's Name: ____________

Address: ____________

City: ____________ State: ____________ Zip: ____________

Phone Number: A/C (   ) ____________

Date Unit Delivered to Retail Purchaser: ____________

Date of Post-Occupancy Checkout: ____________

Retail Purchaser's Name: ____________

Address: ____________

City: ____________ State: ____________ Zip: ____________

Phone Number: A/C (   ) ____________

Customer	Dealer	
☐	☐	Level (doors are not dragging, windows not binding)
☐	☐	Exterior Door Adjustment (doors not dragging, fits properly, flush and no wind around hinges)
☐	☐	Interior Door Adjustment (master bedroom, second and third bedrooms)
☐	☐	Water Connections (kitchen, bath, lavatories)
☐	☐	Plumbing Connections (commodes)
☐	☐	Customer fully understands how to properly light furnace for seasonal variation.
☐	☐	Moulding
☐	☐	Cabinet Door and Drawers checked for proper adjustments
☐	☐	Drain Lines (sewer connections)
☐	☐	Hot Water Heater
☐	☐	Roof
		Other ____________

The above post-occupancy has been performed by the dealer or authorized representative and found to be satisfactory with the Retail Purchaser on this date.

____
Signature of Dealer/Authorized Representative — Date

____
Signature of Retail Purchaser — Date

____
Signature of Witness — Date

Distribution of THREE PART Form:
WHITE — Redman Copy
YELLOW — Retail Purchaser Copy
PINK — Dealer Copy

APPENDIX E

REDMAN MOBILE HOMES, INC.

Dealer Service Agreement

________________ warrants that ________________ (Dealer) had the facilities to properly check out, deliver, set up, and service (or has contracted with an established servicing agency approved by Redman Mobile Homes, Inc.) Redman homes. The Dealer agrees that it will:

1. Assume responsibility for properly setting up those Redman homes sold to retail purchasers, unless the retail purchaser elects to provide for the set up of the home himself.

2. Provide each retail purchaser with a copy of the Redman warranty before execution of the retail sale contract, and provide Redman with a completed warranty card stating the name and address of each retail purchaser and the date of purchase.

3.(a) Where a defect in a Redman home affects the safety of the home, or makes it substantially uninhabitable, commence warranty service as soon as possible in the normal course of business, but in no event later than three business days following receipt of notice of such defect, and complete such repairs expeditiously.

(b) Complete all warranty service, other than that specified in subparagraph 3(a) above, within a reasonable time in the normal course of business, not to exceed thirty days following receipt of the service request.

(c) The "normal course of business" shall not include conditions which place an unusually large demand upon service facilities, such as disasters, strikes, acts of God or of the government, instances of force majeure or other occurrence which are beyond the control of Dealer which prevent Dealer from responding to service requests within the time periods stated in subparagraphs 3(a) and 3(b) above.

4. Where a defect exists in a Redman home which is beyond Dealer's ability to repair or which Dealer will not repair within the time periods stated in subparagraphs 3(a) and 3(b) above, inform Redman of such defect no later than five business days after receipt of the service request, and if the defect affects the safety of the home, or makes it substantially uninhabitable, inform Redman of such defect no later than two business days after receipt of the service request.

5. Perform preoccupancy check out and make necessary adjustments and repairs as Per Redman Mobile Homes, Inc. preoccupancy check out which is attached hereto as Exhibit A, unless the retail purchaser elects to provide for the set up of the home himself. Dealer shall not knowingly deliver possession of a Redman home with any defect that affects the safety of the home or renders it substanially uninhabitable.

6. Perform the post-occupancy check-out and make necessary adjustments and repairs as per Redman Mobile Homes, Inc. post-occupancy check-out, which is attached hereto as Exhibit B, approximately sixty days after acceptance of the home by the retail purchaser, unless the retail purchaser elected to provide for the set up of the home himself.

7. Provide Redman with reports signed by Dealer (or other representative) and the retail purchaser, if possible, regarding the inspections set forth in paragraphs 5 and 6 above.

8. Where a defect or malfunction of a Redman home exists, and a dispute arises between Redman and Dealer as to whether Dealer will be reimbursed for the repair of such defect or malfunction, necessary repairs will be performed expeditiously by Dealer, as provided under Paragraph 3 above, with the dispute to be resolved subsequently.

9. Maintain or contract for service personnel and facilities which, in Redman's

reasonable judgment, are adequate to check out, deliver, set up, and service Redman Homes.

10. In the event of termination of the dealership, provide the same warranty service, as would otherwise be provided, on Redman homes still under warranty or no yet sold to retail purchasers.

Redman Mobile Homes, Inc., agrees that it will:

1. Pay to Dealer $40.00 for a single-wide and $50.00 for a double-wide within thirty days after receipt of preoccupancy check-out sheet signed by Dealer and signed and accepted by the retail purchaser, as outlined in paragraphs 5 and 7 above.

2. Pay Dealer $60.00 for a single-wide and $100.00 for a double-wide within thirty days after receipt of postoccupancy check-out sheet signed by Dealer and signed and accepted by the retail purchaser, as outlined in paragraphs 6 and 7 above.

3. Reimburse Dealer for all warranty service performed by Dealer under the standard Redman Mobile Homes, Inc., warranty, if Dealer requests and obtains prior authorization of such warranty service in accordance with Redman warranty service procedures. As used in this Agreement, "warranty service" includes the following items: (i) defective or broken rafters or side-wall studs; (ii) leaks in water lines in the floor; (iii) short circuits and open circuits in the walls; (iv) defects in the design of the mobile home; (v) breaks or defects in the mobile home chassis; (vi) major repairs to applicances, which will be the ultimate responsibility of Redman's appliance vendors; (vii) major manufacturing defects resulting in structural failure; (viii) other major manufacturing defects which do not result from delivery or set-up, which require the removal or application of interior or exterior wall, floor, or ceiling covering, or repairs to the chassis, of a character similar to those listed above. Dealer understands that it is to perform minor adjustments and repairs to Redman homes without reimbursement other than the payments provided in paragraphs 1 and 2 immediately above, and such minor adjustments and repairs shall be the sole responsibility of Dealer.

This Agreement applies only to homes delivered after the execution date of the Agreement. This Agreement may be terminated by either party giving thirty days' written notice; however, the commitments made by each party hereto will apply to all homes delivered prior to the termination of the Agreement. Dealer understands Redman's intention to terminate the Dealership upon failure to meet Dealer's responsibilities under this Agreement.

In witness whereof, the parties have duly executed this Agreement as of the date and year listed below.

REDMAN MOBILE HOMES, INC. DEALER: (*Name of Dealership*)

By Title: ________________ By Title: ________________
Witness ________________ Witness ________________
Date: ________________ Date: ________________

(Plant will Xerox copies and distribute as follows: Plant Dealer C.S.O. Credit Dept.)

APPENDIX F

Dear Homeowner:

For more than ________________ years Redman Industries has manufactured quality, low cost mobile homes. Our records indicate that in ________________ of ________________ you purchased a Redman produced mobile home Serial No. ________________.

Your home is warranted to be free from defects in material and workmanship for one year from the date of original purchase. If a defect comes to your attention during this time period, the dealer who sold you the home should be contacted. In most cases, he will be able to correct the problem. If the dealer is unable to make the correction, he is required to notify the manufacturer who will then assist in resolving the matter.

In order for us to determine if you have been satisfied with your home, we request you respond to the following questions (if you need more space, please attach a separate page):

(1) Have you experienced any problems with your home that you feel are covered by our warranty or arise from the improper setup or installation of your home?

(2) If so, whom did you notify of these defects or setup problems (if any) and when did notification occur?

(3) Were these problems satisfactorily resolved?

(4) Do you have any suggestions that would be useful to us in improving our product for future customers?

It would be greatly appreciated if you would respond to the above questions and return this letter in the enclosed postage paid envelope.

We thank you in advance for your help in this matter.

Sincerely,

National Quality Assurance Manager

IN THE MATTER OF

LITTON INDUSTRIES, INC.

SUBSTITUTE ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

*Docket 8778. Decision, Mar. 13, 1973 - Modified Order, Mar. 4, 1975**

Order modifying an earlier order issued Mar. 13, 1973, 82 F.T.C. 793, 38 F.R. 8150, against a Beverly Hills, Calif., conglomerate corporation by rescinding the provision requiring respondent to divest itself of Triumph-Werke Nurnberg, A.G. and Adlerwerke, A.G. However, the 10-year moratorium against acquisitions in the office communications equipment field continues in effect.

Appearances

For the Commission: *Joseph J. O'Malley, Harold G. Munter, Lawrence O. Masson* and *Lois E. Berge.*

For the respondent: *Theodore F. Craver,* Beverly Hills, Calif., and *Francis A. O'Brien, J. Wallace Adair, Ralph Gordon, Howrey, Simon, Baker & Murchison,* Wash., D.C.

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* The Order Modifying Cease and Desist Order is reported as corrected by Order of Apr. 8, 1975, which strikes the sentence requiring compliance reports concerning divestiture negotiations.

FINDINGS ON ISSUE OF RELIEF AND RECOMMENDATIONS ON REMAND

BY: ALVIN L. BERMAN, ADMINISTRATIVE LAW JUDGE.

JULY 12, 1974

PRELIMINARY STATEMENT

On Mar. 13, 1973, the Commission issued its opinion holding that Litton Industries, Inc. ("Litton") had violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18), by its Jan. 1969 acquisition of controlling stock interests in Triumph-Werke Nurnberg, A.G. ("Triumph") and Adler-Werke, A.G. ("Adler"). The product markets with respect to which this holding was made were the typewriter industry as a whole, the office and portable typewriter submarkets thereof and the office electric and office manual segments of the office typewriter market. The geographic market was found to be the nation as a whole.

The Commission's order accompanying its opinion directed Litton, within one year, to divest itself of all stock, assets, properties, rights and privileges secured as a result of Litton's acquisition of Triumph-Adler. After requiring Litton to maintain the status quo of Triumph-Adler pending divestiture and enumerating various tangible and intangible items to be included in the divestiture and placing certain limitations thereon, Litton was further ordered, for a period of ten years, not to acquire the whole or any part of the stock, share capital or assets of any concern engaged in the business of manufacturing typewriters or typewriter parts or accessories for sale within the United States without the prior approval of the Federal Trade Commission.

In so deciding the matter, the Commission reversed the hearing examiner's initial decision dismissing the complaint and rejected such findings of the examiner that were inconsistent with its opinion. At the same time, the Commission made additional findings of fact and conclusions of law in support of its opinion.

On Apr. 9, 1973, Litton filed with the Commission a petition for reconsideration of the Commission's order of divestiture. In the alternative, in the event the Commission would not modify its order of divestiture without reconsidering the entire case, Litton moved that the Commission reconsider the full merits of the case and enter an order dismissing the complaint.

In support of its petition for reconsideration of the order of divestiture, Litton asserted that the divestiture of Triumph-Adler would be anticompetitive and contrary to the public interest—that the impropriety of ordering divestiture was demonstrated by the evidence of record and the findings of the initial decision.

Litton argued that divestiture was not always required upon a finding of violation of Section 7 of the Clayton Act and, particularly, that divestiture was not required in the instant case. In addition to relying upon the evidence of record, Litton submitted affidavits with its petition which purported to present new facts together with a resolution of the executive committee of Litton's board of directors to the effect that, if the order of divestiture were to stand, Litton should withdraw from the typewriter industry. Litton alleged the competitive deterioration of all of the smaller companies in the United States office and portable typewriter markets in the face of the entrenched and growing positions of International Business Machines, Inc., ("IBM") and SCM Corporation ("SCM"). In addition, it asserted that the devaluation of the dollar and the ensuing monetary crisis have had a harmful effect on the ability of foreign typewriter manufacturers to compete in the United States against IBM and SCM. According to Litton, it was almost impossible to compete with IBM in the office typewriter market. It was further alleged that events occurring since the close of the record and current conditions have reenforced the hearing examiner's conclusion that Royal could not survive in the United States typewriter business without Triumph-Alder and that allowing Royal and Triumph-Adler to remain together was necessary to promote competition in the office typewriter market.

The importance of Royal becoming a viable competitor in the automatic typewriter submarket was alleged to be of particular significance because of the asserted acquisition by Xerox of the automatic typewriter division of Itel Corporation, including Itel's Diablo printer, and Xerox' development of a new automatic typewriter using the Diablo printer. Litton forecast that Xerox would be able to utilize its established, direct sales organization in the office copier business in conjunction with what was described as a significant advancement in automated typewriters to create a duopoly in the automatic segment of the office typewriter market. This, according to Litton, would make competition even more difficult for others and would make it all the more important for Litton to retain Triumph-Adler in order to offer effective alternative competition in the industry.

In addition to the direct result of lessening of competition in the typewriter industry that was alleged in the event the order of divestiture should remain, Litton alleged that, without Royal, the 900 or so independent office machine dealers who distribute Royal products would probably be forced to leave the typewriter business as they would be unable to secure an acceptable alternative office electric typewriter.

Litton's petition, covering both the request for reconsideration of the order of divestiture and for reopening of proceedings, represented that if the Commission did not consider the affidavits and resolution attached thereto to be acceptable as probative and competent evidence as to the issues involved in the petition, Litton was requesting that the Commission reopen the proceedings to receive evidence as to these issues.

On May 16, 1973, [82 F.T.C. 1424] the Commission reopened this proceeding "solely for the purpose of reexamining the question of relief in its entirety." The proceeding was "remanded to an administrative law judge to conduct hearings on the question of relief." The administrative law judge was directed "[i]n conducting this inquiry * * * [to] examine the question of appropriate relief in its entirety, and upon completion of the hearings, * * * [to] furnish the Commission with his findings on the issue of relief and his recommendations."

The administrative law judge has construed this directive as requiring that, in making such findings and recommendations, he consider the entire record—both the portion made prior to the Commission's opinion and order of Mar. 13, 1973, [82 F.T.C. 979, 1016], and the part developed following the Commission's remand order of May 16, 1973, [82 F.T.C. 1426].

The Commission reopened the proceeding *solely* for the purpose of reexamining the question of relief. Litton's alternative motion to reconsider the merits of the case and enter an order of dismissal was not granted. The holding that Litton violated Section 7 of the Clayton Act by its acquisition of Triumph-Adler, which includes the finding that the acquisition's "effect may be to lessen competition substantially" (C.O. 36),[1] therefore, remains unchanged. Nevertheless, reexamination of the question of relief on the basis of the entire record, which includes the new evidence developed on remand bearing upon the question of whether divestiture should be required, necessarily overlaps the extent findings as to the anticipated effects of the acquisition. Consideration must be given to the probable anticompetitive effects of allowing the acquisition to remain in effect *vis-a-vis* those of requiring divestiture.

As stated in the Commission's order of Mar. 13, 1973, "[T]he findings of the hearing examiner should be adopted only to the extent consistent with the opinion accompanying [the] order"; and as phrased in the opinion, "[T]he examiner's findings inconsistent with our opinion should be rejected." The extant findings, and of course those additional findings stated in the Commission's opinion, therefore, must be given full weight in reconsidering the question of appropriate relief. Nevertheless, the proceeding has been reopened to receive new evidence on the question of relief and such evidence must be considered even if it tends to show the propriety of different findings at this time.

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[1] The following abbreviations are used herein as references: C.O.-the Commission's opinion dated Mar. 13, 1973 [82 F.T.C. 979]; I.D.-the examiner's initial decision dated Feb. 3, 1972 [82 F.T.C. 799]; CPF-proposed findings of complaint counsel; RPF-proposed findings of respondent; CRB-reply brief of complaint counsel; RRB-reply brief of respondent; Tr.-transcript page of original hearing; Tr. R.-transcript page of hearing on remand; CX-Commission exhibit; and RX-respondent exhibit.

The burden of proof to support an order remains with complaint counsel. After ascertaining that complaint counsel had no further evidence to present on direct, the administrative law judge ruled that it was respondent's burden to proceed. Hearings commenced on Dec. 3, 1973, and the last evidence was received on Feb. 5, 1974, at which time the record was closed.[2]

The matter thus is before the undersigned for the purpose of making findings on the issue of relief and recommendations. In so doing, the entire record has been carefully considered, including proposed findings of fact, conclusions and briefs filed by counsel as well as their responses.[3] Those findings not adopted, either in the form proposed or in substance, are rejected either as not supported by the evidence or as involving immaterial matters.

In making findings, the administrative law judge has concerned himself with matters pertinent to the scope of the remand. The Commission's opinion rendered when the case was originally decided contains numerous findings of fact. Hearing Examiner Johnson's initial decision also contains a large number of findings that are not inconsistent with the Commission's opinion and so have been adopted by the Commission. While it would serve no purpose to recite all existing findings in this matter, a reference to certain of such findings and bases of decision would be appropriate at this point to place the case in perspective.

PERTINENT COMMISSION FINDINGS AND HOLDINGS

Litton is a large, conglomerate corporation with numerous diversified products and a worldwide operation. Organized in 1953, its sales increased from $3 million in 1954 to $1.9 billion in 1968 when it had assets of over $1.2 billion. In 1968, it had a cash flow and profits before taxes of over $100 million. Ranked as the 39th largest industrial corporation in the United States in 1969, nearly half of its growth is attributable to over 100 acquisitions since 1953 (C.O. 3). Its largest acquisition up to that time was that of Monroe Calculating Machine Company in 1958, a manufacturer of computers, calculators and adding machines (C.O. 3; I.D. 22).

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[2] By order of Apr. 10, 1974, the Commission extended the time for the undersigned to file findings and recommendations from May 6, 1974, until July 15, 1974.

[3] In making findings and recommendations, the undersigned has also had the opportunity to observe the witnesses who testified during the proceedings conducted pursuant to remand.

The National Office Machine Dealers Association ("NOMDA") was, by order of the Commission, issued May 16, 1973, permitted to participate in the reopened proceeding to the extent of submitting a brief before the administrative law judge. However, no such brief has been filed.

Litton was interested in entering the typewriter industry as early as 1958, but negotiations with Underwood Typewriter Company in that year failed. It did enter that industry in 1965 when it acquired Royal-McBee Corporation. Subsequently, in 1966, it acquired Willy Feiler, GmbH, a German manufacturer which had a prototype of an electric portable typewriter. In November 1966, Litton acquired Imperial Typewriter Company, Ltd. of England. In September 1968, just prior to the Triumph-Adler acquisition, Litton's Royal Division manufactured and sold office and portable typewriters, both manual and electric.[4] It had typewriter plants in Hartford, Conn., Springfield, Mo., Leiden, Holland, Leicester, England and Hull, England. Since 1967, Royal has also distributed "Mercury" portable typewriters manufactured by the Silver Seiko Company of Japan (C.O. 4, 5).

The Springfield, Mo. plant was closed in Apr. 1969 and the production of portable typewriters was moved to the Hartford, Connecticut plant. The Hartford, Connecticut plant stopped producing high-priced office electric typewriters in the summer of 1969. In July 1972, Royal announced the cessation of typewriter production at the Hartford, Conn. plant (C.O. 13).

Litton is organized into four operating groups with some 120 divisions. One of the four groups is the Business Systems and Equipment group which includes business machines and systems, retail and revenue systems, typewriters, office copiers, specialty paper and printing and forms (C.O. 3; I.D. 18-19). This is the group with which we are primarily concerned. In 1970, this group accounted for 29 percent of Litton's total sales (C.O. 4).

Litton is considered a leader in developing and applying advanced management techniques and in combining managerial resources, technical capability, marketing skill and research and development capability to build new businesses and to improve old businesses (C.O. 4). At the same time, each of its 120 divisions is operated as a separate business with its own responsibility for research and development, manufacturing, marketing and investments. Corporate level management, however, does assist and does intercede when a division is operating poorly (I.D. 19-21).

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[4] The Willy Feiler electric portable had design problems and, as of 1970, its production was planned to be phased out (C.O. 5). Similarly, Imperial's office electric typewriter proved unsuccessful and it was unable to develop a portable electric typewriter. Shortly after its acquisition, Imperial's production of office electric and portable manual typewriters was discontinued (I.D. 24-25).

Triumph and Adler were German companies, both of which manufactured typewriters, among other things. After Triumph acquired the controlling interest of Adler in 1958, both Triumph and Adler typewriters were sold in the United States. In 1963, American marketing was limited to the Adler machine. Adler had introduced an office electric typewriter in 1962. By 1963, Triumph-Adler had captured the major portion of the typewriter market in Germany and was supplying about 45 percent of Europe's requirements. By 1968, Adler typewriters were sold in more than 100 markets around the world.[5] Triumph-Adler produces both office electric and portable electric typewriters. As of late 1968, it produced all it sold and was operating at full capacity. By 1964, there were 400-500 Adler dealers in the United States. The number doubled by 1968 and reached 1000 by 1969 (C.O. 6-7, 10).[6]

Triumph-Adler maintained a substantial research and development (R&D) staff with proven capabilities. Its R&D staff was increased by 25 to 50 percent between 1968 and 1970. In 1968 its R&D outlay, expressed as a percentage of sales, was almost twice as much as that of Royal. Early in 1956, Triumph-Adler undertook to design an electric typewriter "from the ground up." This was the basic machine that provided the foundation for Triumph-Adler's technological superiority in the office electric typewriter market with the result that Adler office electric typewriters are considered to be on a par with the best, since they require fewer service calls. After four years of development work, Triumph-Adler announced a portable electric typewriter in 1967 which it introduced into the United States in 1969 (C.O. 7-8).

The Commission found that the product markets within which the legality of the challenged acquisition might be tested were the overall typewriter market, the office and portable typewriter markets which together constitute the overall market, and the submarkets of the office typewriter market which are (1) office electric typewriters, (2) office manual typewriters and (3) self-contained code media automatic typewriters (C.O. 22-24).

The Office Electric Typewriter Submarket

Office electrics and office manuals, while performing similar functions, have distinct physical characteristics which are economically significant and, most important, there is a substantial price difference between them. In recent years, office electric typewriters have become popular and have made remarkable inroads in the office typewriter

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[5] In order to avoid being too dependent on the fluctuations of any one foreign market and to realize the highest revenues from its products, Triumph-Adler's policy is that of not exporting over 60-65 percent of typewriter production outside of Germany (I.D. 60).

[6] Triumph-Adler sells its typewriters in the United States only through independent office machine dealers. It does not sell to mass merchandisers (I.D. 61).

market. During the 1960's, the office electric typewriter submarket was the most important segment of the entire typewriter industry, both in dollar sales and in market growth. Office electric typewriter dollar sales increased from 45.8 percent of all typewriter sales to 53.3 percent in 1968 and accounted for over 65 percent of the total industry growth during that period. In 1963, $162.9 million worth of office electric typewriters were sold in the United States. This figure went up to $307.2 million in 1968, an increase of some 88.5 percent (C.O. 25-26, 37).

There is no basis for grouping high-priced office electrics, factory reconditioned IBM office electrics and automatic typewriters into a so-called "heavy duty" office electric typewriter submarket, as distinguished from low-priced office electrics (office compacts) and office manuals which would be termed a "light duty" office typewriter submarket. Such a breakdown of the office typewriter market by the examiner, for the purpose of measuring market shares, was rejected by the Commission (C.O. 26-30).

In rejecting the examiner's inclusion of reconditioned IBM electric typewriters in the product market, the Commission stated that it found no convincing evidence to the effect that IBM reconditioned typewriters exercise any significant and direct influence upon the purchasing decisions of prospective buyers of new office electric typewriters (C.O. 30).

The Office Manual Typewriter Submarket

While the number of office manual typewriters sold in the United States declined from 466,000 in 1966 to 354,000 in 1968, the 1968 sales amount to $90.4 million. The Commission found that, although office manuals no longer occupy the dominant position they held prior to the advent of electric typewriters and have been losing ground, they are not obsolescent and are preferred by certain classes of users; that the market is an important and profitable one and the demand is expected to level off (C.O. 25-26, 30-31; I.D. 74).

The Automatic Typewriter Submarket

While recognizing that automatic typewriters are far more expensive than conventional typewriters, the Commission took cognizance of the fact that they are offered at attractive rentals with the result that they have enjoyed growing acceptance. In finding this to be a submarket of the overall office typewriter market to be taken into account, the Commission stated:

> * * * We are persuaded that automatic typewriters have established a secure foothold in the office typewriter market, and that their importance will probably increase in the years to come (C.O. 33).

The Commission, however, limited this submarket to automatic typewriters which are self-contained units and can be used as a standard electric typewriter when the code media device is not switched on. The Commission described the automatic typewriter which was to be included as a self-contained unit consisting of a keyboard and a printer (in essence an electric typewriter) and an electronic code media control device which codes or records what is typed and is capable of being used to play back corrected, revised or repetitive products.[7] Excluded from this submarket were various typing systems which use terminal typewriters, remote computers and others with various specialized applications (C.O. 32-33).

Consistent with the Commission's finding as to the importance and anticipated growth of the automatic typewriter submarket are the examiner's more detailed findings with respect to this category of typewriter (I.D. 82-88).

The Portable Typewriter Market

While recognizing that electric portables and manual portables may constitute separate submarkets of the portable typewriter market, the Commission found no need for purposes of its opinion to bifurcate this particular market (C.O. 35).

Competition in the Industry

Prior to World War II, four so-called historical typewriter companies controlled over 95 percent of the typewriter industry of the United States. These were Remington, Underwood, L.C. Smith & Bros. Typewriter Company and Royal. Woodstock and several European typewriter companies also sold here, as did IBM which had entered in 1933 when it acquired the rights to an electric typewriter (C.O. 10-11).

During the war, the four historical typewriter companies were required by the United States Government to discontinue the manufacture of typewriters and engage in production of war materials. IBM and Woodstock were the only two domestic typewriter companies not so bound. Woodstock continued to manufacture an office manual typewriter. IBM continued to develop and produce its electric typewriter. After the war, the four historical companies resumed production of their manual typewriters. In the early 1950's, the historical companies attempted to meet the demand for electric typewriters by adding a motor to their office manuals. While the sale of office electric typewriters surpassed sales of office manual typewriters by 1962, the historical companies failed to produce a fully-electric typewriter until the mid-1960's. Royal introduced a fully-electric typewriter in 1966 (C.O. 11; I.D. 29-32).

As a result of the introduction of electric typewriters and the new competition (that of IBM and of foreign-based companies), the four historical companies no longer control the domestic typewriter industry. IBM emerged as the new industry leader in the office electric typewriter submarket, although in 1968 Royal ranked first in the office manual typewriter submarket with over 40 percent, second in the office electric typewriter submarket with 11.4 percent and second with 21 percent of the portable typewriter market to SCM which had 50 percent (C.O. 12).

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[7] Specifically included were the IBM Magnetic Tape Selectric Typewriter (MT/ST) and the IBM Mag Card Selectric Typewriter (MC/ST), a 1969 innovation which uses magnetic cards instead of magnetic tapes.

From 1903 through 1968, twelve typewriter manufacturers competed in the sale of typewriters in the United States. These were the four historical companies: Remington Rand Division of Sperry-Rand Corporation (successor to Remington), SCM (ultimate successor to L.C. Smith & Bros. Typewriter Company), Royal, and Olivetti (acquirer of Underwood), IBM, R.C. Allen and six foreign-based companies-Triumph-Adler, Olympia, Hermes, Facit, Brother, and Nippo. Four additional companies, Friden-Singer, Itel Corporation, American Automatic Typewriter Company and Editype Corporation, sold only automatic typewriters. Woodstock was acquired by R.C. Allen in 1950, but R.C. Allen discontinued its typewriter business in 1970 (C.O. 12, 14, 15, 18, 43).

IBM manufactures and sells throughout the world various office machines, including office electric typewriters and automatic typewriters. It does not manufacture office manual or portable typewriters. IBM's total sales of products and services in 1968 approximated $7.2 billion, which placed it fifth among the nation's largest industrial corporations. Its electric typewriters and automatic typewriters sold in the United States are manufactured in its own plants in the United States.

After World War II, when electric typewriters became generally accepted, IBM became a modest factor in the typewriter industry. During the 1960's, it established itself as the leader in the office electric typewriter market. In 1961, IBM introduced its "Selectric" typewriter which is a single element electric typewriter. This has been called the single most important development in the typewriter industry to date. Since its introduction, it has become the dominant machine in the office electric typewriter market. It is also the standard printer generally used by the industry in code media automatic typewriters. IBM introduced its magnetic tape selectric code media automatic typewriter (MT/ST) in 1964 and, in 1969, introduced its mag card selectric code media automatic typewriter (MC/ST).

In 1969, IBM manufactured 144,230 model D standard typewriters, 51,297 model D executive typewriters and 273,280 selectric typewriters. IBM sells and services its typewriters in the United States on a direct basis through its own sales organization. In 1969, it had over 200 branch offices and employed 2,928 salesmen and 6,178 servicemen (C.O. 16-17; I.D. 48-52).

In 1968, Royal's office typewriter operation was profitable. Its portable typewriter operation was not (C.O. 6). Royal discontinued the sale of automatic typewriters in 1968. Adler did not sell automatic typewriters (C.O. 41).

From 1948 through 1965, all of Royal's electric typewriters were based upon various means of electrifying the Royal manual typewriter. From 1961-1966, Royal had spent almost $4 million in an attempt to design a single element printer from scratch. The project was unsuccessful and was dropped. In 1966, after being acquired by Litton, Royal introduced the 660 standard office electric typewriter. It was initially successful but soon proved to have many basic quality problems (I.D. 146-151).

The Commission, as a matter of law, rejected Litton's contention that it needed the typewriters produced by Triumph-Adler in order to prevent further decline in its position and remain competitive (C.O. 48-49). The Commission also found that Royal did not face the imminent prospect of sliding into a bankrupt position without the benefit of the challenged acquisition; that, to the contrary, contemporaneous documents from Litton-Royal files reflected confidence and optimism about Royal's future market opportunities in the United States and took for granted Royal's continuance as a substantial factor in the typewriter industry. The Commission found that the acquisition was chosen as a more economical, less risky and more expedient course of action to other alternatives for continuing to remain a viable competitor in the typewriter industry. The Commission specifically "reject[ed] the examiner's finding that, had Litton not acquired Adler, the only alternatives confronting Litton would have been either to let Royal degenerate into a bankrupt situation or to close it" (C.O. 49-51).

Barriers to Entry

Barriers to entry in terms of technological and marketing requirements were found to be formidable, especially in the office electric typewriter market. It took Royal and SCM four to five years and more of developmental work before they could successfully develop and market a fully electric office typewriter in the United States. Triumph-Adler required over five years to develop and market an electric typewriter. The task of establishing an effective marketing organization and achieving a degree of market penetration needed to attain competitive costs is time-consuming and difficult. In addition, the field is already occupied by powerful, diversified firms including IBM, Litton, Sperry-Rand, Olivetti-Underwood and SCM. These factors account for the situation that no domestic manufacturer has entered the United States typewriter market since 1934 except through acquisitions (C.O. 43,44).

The Finding of Violation

In evaluating the probable effect of the challenged merger for purposes of ascertaining whether there had been a Section 7 violation, the Commission relied upon an analysis of market shares and market structure which showed that the horizontal merger significantly increased already existing high concentrations in the markets considered. It took heed of *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362-63, 365 n. 42 (1963), where it was held that any merger which effects an undue increase in concentration presumptively violates Section 7 and that where an industry is already highly concentrated, "the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great" (C.O. 36).

In assessing market shares, the Commission held that dollar revenues realized by the various sellers was not the only accurate measure. Suggested retail prices were also considered reliable criteria in measuring market positions where, as here, some sales are directly at retail while others are at wholesale. Unit sales were also deemed important (C.O. 38 n. 24).

The Commission held that an "examination of the market structure of the individual product markets showed that the markets were highly concentrated; that the horizontal merger significantly increased the existing high concentration," so that the merger violated Section 7 (C.O. 37). Thus, violation was found with respect to (1) the office electric typewriter market where the second ranking firm with 11.4 percent of the market had absorbed the sixth ranking firm with 3.2 percent (C.O. 37-39), (2) the office manual typewriter market where the top ranking firm with 41.8 percent of the market had acquired the fifth ranking firm with 3.9 percent (C.O. 40-41), (3) the overall office typewriter market where the situation was stated to parallel roughly those of the office electric and the office manual typewriter submarkets (C.O. 41), (4) the portable typewriter market where the merger resulted in the absorption of the seventh ranking firm with 1 percent of the market by the second ranking firm with 20.5 percent (C.O. 42), and (5) the typewriter industry overall wherein the second ranking firm had acquired the eighth ranking firm and had thereby increased the combined share of the top four firms from 79.7 percent to 80.3 percent (C.O. 43-44).[8]

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[8] As Triumph-Adler's share in 1968 was found to be 2.6 percent (C.O. 43), the correct figure for the combined share of the top four firms after the merger was 82.3 percent.

EVALUATION OF BASIS FOR ORDERING DIVESTITURE

It is clear from the above that, in so finding a violation of Section 7 and ordering Litton to divest itself of Triumph-Adler, the Commission anticipated the continued existence of both Royal and Triumph-Adler as viable competitors in the various markets and submarkets of the United States typewriter industry.[9] Indeed, the Commission, in assessing the situation as of the time of the January 1969 acquisition by Litton of Triumph-Adler, rejected the examiner's finding that Litton's only alternative to the merger would have been to allow Royal to slide into bankruptcy or to discontinue the typewriter business (C.O. 51 n. 38).

This basis for ordering divestiture, however, would disappear, or at least would have to be reexamined, if, contrary to what was anticipated in the Commission's decision, it should be found that Litton, by reason of the order of divestiture, would find it necessary to withdraw from all or a major portion of the typewriter industry. For then, instead of preserving the competition of Triumph-Adler in addition to that of Royal, Triumph-Adler's competition would be preserved at the expense of losing the larger competitive force of Royal. The competition aligned against the dominant factor in the industry, IBM, would be decreased by the order of divestiture rather than maintained, as intended.

This, essentially, is respondent's position. It contends that Royal is dependent upon Triumph-Adler for its basic, competitive office electric typewriter, and that it is also dependent upon the printer of that typewriter as an essential part of its automatic typewriter which it is about to market. Litton also contends that it does not have the research and development (R&D) capabilities to develop an electric office typewriter to replace that currently supplied by Triumph-Adler or to replace the printer it needs for its automatic typewriter. According to Litton, if it is required to give up Triumph-Adler, it will have to withdraw from the office electric typewriter market and abandon its efforts to enter the automatic typewriter market.

It is necessary, therefore, under the terms of the Commission's remand order, to evaluate Litton's contentions summarized above. This must be done in the light of its alleged dependence upon Triumph-Adler and its capacity to compete without Triumph-Adler. The latter consideration, in turn, requires an assessment of the present and potential importance of various areas of the market. Such an assessment, together with a consideration of the competitive situation in such areas, is also necessary to determine whether it would be in the public interest to order the divestiture.[10]

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[9] This was also anticipated by Commissioner Dennison as indicated in his concurring opinion, at pp. 9-12, [82 F.T.C. 976-979] where he agreed that action should be taken to prevent the loss of a significant competitor or of even a small competitor in an industry dominated by giants.

OVERVIEW OF INDUSTRY

Complaint counsel and respondent have conflicting views as to how the typewriter industry should be analyzed for purposes of this remand. Complaint counsel take the position that the analysis should be in terms of the particular markets and submarkets considered by the Commission in finding violations of Section 7; that the only figures to be considered are those reflecting *sales* of typewriters at *suggested retail list price* or in terms of *units*. Thus, complaint counsel have submitted, as proposed findings 10, 17 and 22, compilations of United States sales and shares by company of (1) all office typewriters at suggested retail list price and in units, (2) office electric typewriters at suggested retail list price and in units and (3) office manual typewriters at suggested retail list price and in units.[11]

Respondent, on the other hand, contends that, for purposes of this remand, particular attention should be paid to the total office typewriter business, with emphasis on those areas or segments which are and which promise to be most active-the areas alleged by respondent as those from which it will be forced to withdraw if it is required to divest itself of Triumph-Adler. Respondent also contends that, for purposes of this remand, actual revenues are more meaningful than suggested list prices or unit sales and that lease and rental income should be included in computing revenues-that revenues should not be limited to those resulting from sales. Accordingly, respondent urges primary consideration of compilations of (1) total United States office typewriter sales, (2) total United States office electric and automatic typewriter sales and (3) total United States heavy duty office electric and automatic typewriter sales–all three being compilations of actual revenues including rental incomes.[12]

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[10] This approach does not conflict with the Commission's holding that a merger may not be justified in order that the market position of one of the leading firms in the market not decline or by reason of other economic benefits to the acquiring company (C.O. 49). Nor is it inconsistent with the Commission's rejection, under prevailing case law, of the concept of "countervailing power" (C.O. 52-53). It is, rather, a consideration of whether divestiture would, for all practical purposes, trigger the withdrawal of the acquiring company from an industry-a consideration that is, for all practical purposes, the counterpart of taking into account whether an acquired company would otherwise have gone out of business.

Complaint counsel appear to question the propriety of considering on remand the question of whether Royal would withdraw from any portions of the market, arguing that the Commission has already held that Royal had alternatives to going out of business if it had not acquired Triumph-Adler. That finding as to the possibilities open to Royal in 1969, however, may well differ from what may be anticipated as good business judgment on the part of Litton if it is required to divest itself of Triumph-Adler in 1974. Further, Litton's petition to the Commission for reconsideration of the order of divestiture was, in large part, grounded upon the assertion that, without Triumph-Adler, it would be necessary for Litton to dispose of the assets of Royal. By granting the motion for reconsideration, the Commission is understood to have directed the undersigned to consider this contention as well as the competitive implications and the public interest in the event the assertion should be found to have substance.

[11] Supplementary sales figures pertaining to the entire typewriter industry and the portable typewriter submarket were not introduced on remand.

Limitation of Analyses to the Particular Markets and Submarkets Considered by the Commission in Finding Violations of Section 7

While the Commission found, *inter alia*, that the office typewriter market and the office manual and office electric submarkets thereof were appropriate markets within which to ascertain whether Section 7 had been violated, we are not now concerned with whether respondent should be deemed to have violated Section 7 on the basis of updated statistics relative to those markets. The question of violation has not been reopened by the Commission.

The primary question now is whether it would be in the public interest to require the divestiture of Triumph-Adler. This question, in turn, depends upon whether Litton, without Triumph-Adler, would find it necessary to get out of all or part of the typewriter industry, the relative importance of the segments of the industry that would be affected by Litton's departure and the competitive situations in the various segments, so that an appraisal may be made of the loss of Litton's competition in any particular areas *vis-a-vis* the effect of the merger in areas in which Litton might be expected to remain.

The segments that must now be considered may or may not conform to the markets and submarkets assessed by the Commission in finding violations. Even if they do not conform, they must be considered if to do so may serve to shed light upon the issues now before us. For example, while the Commission recognized that automatic typewriters constitute a submarket of office typewriters, one which showed promise of increasing in importance (C.O. 32-33), the Commission did not find a violation in that submarket since neither Royal nor Triumph-Adler made automatic typewriters (C.O. 42). Notwithstanding the lack of finding of violation in the automatic typewriter submarket, an analysis thereof is highly important on this remand.

Complaint counsel make particular objection to consideration of what respondent has termed "heavy duty" office electric typewriter sales. This term includes automatic and standard office electric typewriters to the exclusion of compact office electric and office manual typewriters. Complaint counsel rely upon the fact that the Commission rejected the examiner's delineation of such a market (C.O. 26-29).[13] The typewriters encompassed by the term "heavy duty," however, are the very products for which Litton claims it depends upon Triumph-Adler, the very products which it claims it must discontinue if divestiture is ordered. The situation with respect to "heavy duty" office electric typewriters, therefore, is one appropriately to be examined within the terms of the remand.

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[12] Respondent also relies upon compilations of total United States office typewriter sales and total United States office electric and automatic typewriter sales, both in terms of suggested retail list price, but reflecting rental income as well as sales revenues.

[13] As then defined by the examiner, "heavy duty" office electric typewriters would also have included IBM factory reconditioned electric typewriters.

In appraising the viability of Royal as well as that of other competitors in the market, it is necessary to view the market as a whole. But it is also necessary to ascertain the success and potential of competitors in the relatively important and growing segments of the market regardless of whether these segments coincide with the submarket delineations that were utilized in finding Section 7 violations. A study of sales with respect to those areas where the action is-where the dollars are to be garnered-is significant both to judge whether respondent would stay in business under particular circumstances and to evaluate the public interest in the event respondent's competition and potential competition should be lost to particular segments of the industry.

Inclusion of Rental and Lease Income

Complaint counsel's contention that lease and rental income should be ignored is rejected. Such income accounts for a large share of IBM's total revenue and its omission would distort any consideration of what is occurring in the office typewriter market. For example, as of the end of 1972, IBM had out on lease or rental 66,836 office electric typewriters and 55,431 automatic typewriters (RX 2164, *in camera*). During 1972, IBM received $17.9 million in lease or rental income for office electric typewriters and $127.3 million for leased or rented automatic typewriters, or total earnings of $145.2 million (RX 2008, *in camera*).[14] This figure represents more than 25 percent of all revenues realized by all companies combined (including IBM) from office typewriters in 1972 and is substantially the same as what all companies other than IBM received from office typewriters in that year (RX 2105, *in camera*).[15]

There is no bar to jointly considering sales and rental income. Both sources constitute revenue to the company from which profits on the typewriters are derived. Indeed, a lease of a typewriter for a period may be considered as a "sale" of the use of the typewriter for that period. The rental income reflects the competitive weight to be given to the machine for the period rented and the impact upon IBM's competitors of typewriters leased or rented by IBM is just as real as if the machines had been sold.

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[14] In 1972, 83.5 percent of IBM's revenues from automatic typewriters were from leases and rentals. IBM received $127.3 million from leases and rentals and $25.1 million from sales (RX 2007 B, *in camera*). The terms leases and rentals are used to distinguish between the length of time of the arrangement.

[15] The exhibit shows that all other typewriter companies received $128 million for their office typewriters in 1972. This is some $17 million less than the $145.2 million IBM received in lease and rental income during that year. The exhibit, however, does not reflect income from automatic typewriters received by those companies not shown on the exhibit. The parties disagree as to the amount in question. Respondent concedes that some $13 million is involved (RPF 163-64), while complaint counsel assert the figure is $19.4 million (CRB 30). See Table 5, *infra*, for discussion of this dispute.

It is clear, therefore, that no meaningful analysis of the office typewriter market may be made without considering income from leased and rented items.[16]

Consideration of Actual Revenues, Suggested Retail List Prices and Unit Sales

In its opinion, the Commission stressed the relative importance of measuring market shares in terms of suggested retail list prices and unit sales over simply comparing actual revenues of the various competitors. This was because some of the firms sold primarily at retail while others sold primarily at wholesale or some combination of the two methods. Utilization of realized revenues was deemed to commingle dollar sales at the two different wholesale and retail levels (C.O. 38 n 24).

Under the present remand, however, we are not as much interested in ascertaining market shares as we are in appraising the competitive strengths and potentials of the various firms in the industry and in the various segments thereof. An assessment of the viability of any company requires an examination of its income, for profits are realized out of income and profit goals are usually set in relationship to dollar volume of business of the company, not of its customers.

IBM makes all sales directly at retail. It offers no discounts except on sales to schools and governments (RPF 27). IBM's suggested list prices and its realized income, therefore, are substantially the same.[17] Its competitors, however, sell largely through dealers who normally purchase at 40 percent off of suggested retail prices, sometimes more depending upon quantities purchased. In addition, quantity discounts are given to direct purchasing national accounts as well as to schools and governmental agencies (I.D. 90; RPF 31-33).

IBM's competitors did not receive the $197 million suggested retail sales prices of their office typewriters sold in 1972, but only 65.5 percent of that amount, or $128 million (CX 698, RX 2105, both *in camera*). Nor did Royal receive the $57.1 million suggested retail sales prices of its office typewriters sold in 1972, but only 73 percent of that amount, or $41.8 million (CX 698, RX 2105, both *in camera*).

The use of suggested retail list prices, therefore, drastically overstates the competitive viability of IBM's competitors including that of Royal, both in absolute terms and in relationship to that of IBM.[18] A comparison of actual revenues is much more meaningful for purposes of this remand.

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[16] This conclusion is in accord with the Commission's finding that automatic typewriters should be included as a submarket of the office typewriter market inasmuch as they do compete with other office typewriters on the basis of attractive rental offerings (C.O. 32-33).

[17] Indeed, in attempting to compute suggested retail prices, IBM reported $411.9 million as opposed to $426.6 million in actual income (compare CX 581 B with RX 2105, both *in camera*). Hence, in comparing sales of competitors on the basis of suggested retail list prices, there is approximately a 3.5 percent understatement of IBM's revenue.

For purposes of this remand, actual revenues are also more meaningful than unit sales data. Again, we are not so much interested in market share as we are in viability of competition, with particular emphasis on appraising whether Royal would remain in business if it should be required to divest itself of Triumph-Adler. For this purpose, numbers of typewriters sold are not nearly as important as dollars received and profits realized.

Unit sales are particularly inappropriate in assessing the viability of competitors in the overall office typewriter market. In 1972, 216,324 manual typewriters were sold at a total retail list price value of $52,475,000, or at about $242 per unit (CXs 703 A, 704, both *in camera*). At about the same time, retail prices of representative standard office electric typewriters ranged from $500 to $600 (RPF 226). Automatic typewriters have a retail value of up to $17,950 with IBM's MC/ST valued at about $10,000 (CPF 123 n 4). It would be relatively meaningless, in assessing viability, to know the numbers of typewriters sold by the various companies in the office typewriter market unless the units were differentiated by category. Even then, because of the variances among typewriters within a category, revenue received is a more meaningful measure of viability.

There is still an additional reason for preferring an analysis of revenue over unit sales. This is the practical difficulty of constructing unit sales. As noted above, as of the end of 1972, IBM had out on lease or rental 66,836 standard office electric typewriters and 55,431 automatic typewriters, a total of 122,267 units.[19] This is approximately the same number of office typewriter units that Olivetti, the third largest competitor, sold that year (CXs 703, 705, both *in camera*). In computing units, however, the same weight may not be given to machines sold and those rented. A sold machine is counted as one unit in the year of sale. A rented machine, however, may be rented for a number of years and would produce income for each of those years. It could be counted as a unit in years subsequent to the first no more than a typewriter sold in a prior year, but still in use in subsequent years, could be counted as a unit in those subsequent years. On this record, there is no practical way of giving appropriate comparative weights to machines sold and leased in a given year other than considering revenues.

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[18] Since IBM sells directly to consumers, the retail price is revenue to IBM. In order to compare the viability of Royal and the competition afforded by others in the market, their revenues should also be considered. Dollar revenues, from which profits are derived, are what Royal will look at in deciding whether to stay in business.

[19] IBM had 118,358 units on lease or rental at the end of 1971 and 117,272 units on lease or rental at the end of 1970 (RX 2164, *in camera*).

Market Statistics

In evaluating the statistics reflecting the competitive situation, therefore, primary weight will be given to revenues received, with additional consideration given to computations reflecting suggested retail list prices and unit sales, as appropriate. The following tables are relevant to the matter under consideration.

[EDITORS NOTE: Tables 1-11 are not reproduced here for the reason that they have been placed in *in camera* files.]

Another pertinent market statistic relates to the relative importance of IBM's Selectric typewriter, the only single-element typewriter on the market today.[20] In 1972, IBM's revenue from Selectrics was 36 percent of all revenue of all companies from office typewriter sales. It exceeded by $71 million all non-IBM office typewriter sales that year. Sales of Selectrics accounted for 41 percent of all heavy-duty office electric typewriter revenues, 49.6 percent of all nonautomatic office typewriter revenues and 59.2 percent of all office electric typewriter sales revenues realized in the United States by all companies in 1972 (RXs 2105, 2007 B, 2008 B, all *in camera*).

As indicated previously, the Commission refused to include reconditioned IBM electric typewriters in the product market (C.O. 30). For purposes of remand, it is here noted that in 1972, IBM received $17.9 million on sales and rentals of reconditioned demonstrator electric typewriters to schools and reconditioned used electric typewriters to wholesale distributors (RXs 2007 B, 2008 B, both *in camera*). IBM's $17.9 million in revenues from reconditioned demonstrator and used office electric typewriters was exceeded only by Royal's $29.5 million and Olivetti's $24 million in revenues from office electric typewriters. (See Table 3, *supra*.)

The record on remand contains no additional sales data covering the United States portable typewriter market. Thus, the latest data in the record is to the effect that, in 1968, SCM accounted for 50 percent of a $178 million market computed at suggested retail prices, Royal was second largest with 21.5 percent and Adler was the seventh ranking firm with 1 percent (C.O. 42). In terms of actual revenues received, the total market was $114.3 million, with SCM's share 52 percent, Royal's share 22 percent and Adler's share 1 percent. In 1969, in terms of actual revenues received, the total market was $117.6 million, with SCM's share 57 percent, Royal's share 16.3 percent and Adler's share 1.3 percent (I.D. 121).

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[20] This has been noted by the Commission as the most important development in the typewriter industry to date, the dominant machine in the office electric typewriter market and the standard printer in code media automatic typewriters (C.O. 17).

With the foregoing statistical analyses in mind, we now turn to respondent's contention that, without Triumph-Adler, it would be forced to withdraw from the typewriter market.

REMOVAL OF LITTON FROM TYPEWRITER MARKET

Events Leading to Litton's Acquisition of and Dependence upon Triumph-Adler

Prior to its acquisition of Triumph-Adler in January 1969, respondent's overall office typewriter sales were decreasing whether measured in absolute revenues, suggested retail prices or market shares.[21] Its office electric typewriter sales increased slightly in 1967, but dropped in 1968.[22] As for a heavy duty standard electric, its sales were only $3.9 million in 1965. It introduced the Royal 660 standard office electric in 1966 with initial success, but that machine had many basic quality problems and, by November 1967, sales began to decline substantially (I.D. 147-51, 156).[23] Royal's sales of both manual typewriters and compact office electric typewriters were declining. Its share of sales of compact electric typewriters was also declining.[24]

Faced with declining sales and an unacceptable standard electric typewriter (Royal 660), it was concluded that there was no way to keep Royal viable with its current product lines (I.D. 156-57). The alternatives were (1) internal development of an office electric machine, (2) distribution of an office electric machine and (3) acquisition of a foreign manufacturer with a good electric machine and a strong market position abroad (C.O. 51). Respondent opted for alternative number 3 and, in January 1969, acquired Triumph-Adler.

Respondent phased out production of the Royal 660 standard electric typewriter in 1969 (Tr. 7762-63; Tr. R. 856-57) and, effective January

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[21] Actual revenues decreased from $60.5 million (18.5 percent share) in 1966 to $58.8 million (17.1 percent share) in 1967 to $53 million (14 percent share) in 1968. Based on suggested retail list prices, the decrease was from $80.7 million (19.1 percent share) in 1966 to $77.1 million (17.8 percent share) in 1967 to $72 million (16 percent share) in 1968. (See Tables 1 & 2, *supra.*)

[22] Based on suggested retail list prices, Royal's figures were $30.6 million (11.1 percent share) in 1966, $35.7 million (12.4 percent share) in 1967 and $34.9 million (11.4 percent share) in 1968 (CX 702, *in camera*). Share percentages are slightly overstated as they do not take into account IBM's rental revenues.

[23] Heavy duty office electric typewriter sales increased (in actual revenues) from $3.9 million in 1965 to $6.3 million in 1966 and $15.8 million in 1967. But by 1968, revenues had fallen to $12.7 million (Table 8, *supra*). These figures do reflect a small amount of automatic typewriter sales in 1965, 1966 and 1967. (Compare Table 7, *supra* and CX 702, *in camera*, which reflect, in suggested retail list prices, automatic typewriter sales by Royal of $.77 million in 1965, $1.3 million in 1966 and $.9 million in 1967. The tables show there were no revenues from automatic typewriters by 1968. See also C.O. 41).

[24] In 1966, Royal sold 187,487 manual typewriters which had a suggested retail list price value of $48.7 million. This went down to 155,421 units and $40.4 million in 1967 and 146,676 units and $37.8 million in 1968 (Tables 9 and 10, *supra*).

Royal's sales (in revenues received) of electric compacts was $17.1 million (70.7 percent share) in 1965, $19.6 million (59.8 percent share) in 1966, $15 million (46.8 percent share) in 1967 and $14.8 million (39.9 percent share) in 1968. (See Table 11, *supra.*)

1970, distributed as its standard electric typewriter the model 970 which was made for it in Germany by Triumph-Adler (Tr. R. 854-55). Respondent has been attempting to develop an automatic typewriter (a computer typing system - "CTS") since 1968 (Tr. R. 862-63).[25] This typewriter is presently undergoing test marketing (Tr. R. 753, 1106-07). The printer used in respondent's automatic typewriter is made by Triumph-Adler. It is the same basket type that is used in the model 970 (Tr. R. 733-34, 753, 758-60, 862-62A).

IBM's Selectric is the standard printer in most code media automatic typewriters (C.O. 17). Triumph-Adler started working on a single element printer in 1968 or 1969. It will soon be ready for limited production and testing. Triumph-Adler is already working on an advanced version single element printer (Tr. R. 1392-94, *in camera;* Tr.56-57).

Thus, Litton depends upon Triumph-Adler both for its standard electric typewriter and for the printer of its proposed automatic typewriter.[26] It is also dependent upon Triumph-Adler for the single element printer for use in its standard electric and automatic typewriters when that printer is ready for marketing.

Direct Effects of Order Requiring Litton to Divest Itself of Triumph-Adler

(1) Standard electric and automatic typewriters.

The direct effects of an order requiring Litton to divest itself of Triumph-Adler, therefore, would be to stop Litton from selling standard electric typewriters and remove its capability to enter the automatic typewriter market. Thus, Litton would be foreclosed from competing for a share of those revenues which, in 1972, constituted 88.62 percent of all revenues realized from the sale and lease of office typewriters in the United States (application of Tables 1 and 8, *supra*).[27] In the office electric typewriter submarket, it would be foreclosed from competing for sales of standard electrics which, in 1972, accounted for 89.27 percent of all revenues in that submarket. (application of Tables 3 and 11, *supra*.)

If forced to divest Triumph-Adler, respondent would not only lose its standard electric typewriter and the printer for use in its projected automatic typewriter, but it would also lose the R&D capability necessary to develop such a typewriter and printer. As already found by the Commission, Triumph-Adler had a substantial R&D staff with proven capabilities. This staff was increased by 25 to 50 percent between 1960 and 1970. In 1968, Triumph-Adler's R&D expenditures, expressed as a percentage of sales, were almost twice as large as Royal's (C.O. 8). R&D outlays at Triumph-Adler have increased at a faster rate since the acquisition than before. Triumph-Adler now has an R&D staff of between 600 to 700 with half working on electromechanical devices (including typewriters). It has successfully developed a single element printer for use in an automatic typewriter and is already developing an improved printer for that purpose. The Triumph-Adler single element typewriter is soon to be test marketed (CPF 321-23).

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[25] The project originally started with Royal in 1966 and was then known as the Overland project (CPF 300).

[26] Royal's lightweight typewriter, formerly model 560, has been drastically redesigned by Triumph-Adler's research and development personnel in Germany and is being marketed as model 590. It would require complete reengineering to perform as a heavy duty machine. The extent of redesign necessary to make the machine suitable as a standard electric typewriter or to be used as the printer in an automatic typewriter would be almost as extensive as starting from scratch to make a new heavy duty office typewriter. Royal does not have design and mechanical engineers capable of doing this (Tr. R. 879-80, 884-85, 1104-06).

[27] Automatic typewriters account for 31.85 percent and standard electrics account for the other 56.77 percent (application of Tables 1 and 5, *supra;* also Tables 3 and 11, *supra*). Complaint counsel have objected to considering automatic typewriters as part of overall statistics because of their relatively high costs. Excluding automatic typewriters, standard electric typewriters account for 83.29 percent of revenues from all office typewriters (application of Tables 3 and 11, *supra*).

Royal, on the other hand, has no R&D personnel capable of conceiving and developing a typewriter. When the model 970 was introduced, Royal had 130 employees engaged in R&D work. Today Royal has five sustaining engineers, only one of whom has a degree. The rest of its R&D staff are draftsmen or model shop employees. The function of Royal's R&D staff of some 30 to 40 persons is to handle service complaints (CPF 306-07; RPF 231).[28]

There can be no question that, at least with respect to standard electric and automatic typewriters, Royal has no product, production or R&D and that it is totally dependent upon Triumph-Adler. This is conceded by complaint counsel (CPF 334, 442).[29]

(2) Compact electric and manual typewriters.

Litton would not be directly foreclosed by the loss of Triumph-Adler from competing for revenues realized from the sale of compact electric and manual typewriters. The sale of compacts, however, accounts for only 6.82 percent of total office typewriter sales revenues (application of Tables 1 and 11, *supra*), 10 PERCENT of total office typewriter sales revenues excluding the sale of automatic typewriters (application of Tables 3 and 11, *supra*) and 10.73 percent of all revenues in the office electric typewriter submarket (application of Tables 3 and 11, *supra*). While revenues from the sale of compact office electric typewriters increased from $24.2 million in 1965 to $45million in 1969, revenues decreased to $39.2 million in 1972. Royal's revenues from this type of typewriter went down from $17.1 million in 1965 to $13.8 million in 1972 and its share of revenues received has decreased each year from 70.7 percent in 1965 to 35.1 percent in 1972 (Table 11, *supra*).

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[28] Royal does have a separate R&D staff of about nine people engaged in developing everything for its automatic typewriter except the printer which was developed by Triumph-Adler. These R&D personnel have been working continuously on development of the CTS since 1969 (CPF 308-09).

[29] Complaint counsel's position appears to be that Litton has allowed this situation to develop despite the complaint's challenge to the merger and the protective agreement with Commission counsel whereby Litton agreed to operate Triumph-Adler separately and to maintain it independent of any other Litton division (see C.O. 10 n. 7); that, under such circumstances, Litton's dependence upon Triumph-Adler should be disregarded in reaching a decision on remand.

To the contrary, Litton is not deemed to have violated the protective agreement. Triumph-Adler has been maintained independent to the extent agreed to. Litton has not been shown to have taken any action with respect to Triumph-Adler that would impede the carrying out of an order of divestiture. Further, there is no question but that Litton acquired Triumph-Adler in order to secure and make use of its products and R&D capabilities. The discontinuance of a Royal product that was unsatisfactory and the steps taken to rely upon Triumph-Adler's products and R&D personnel, together with the dismantling of an unnecessary and unsatisfactory Royal R&D contingent, has not been shown to be other than the exercise of good business judgment under the circumstances. The obligation of the Commission remains to determine what relief would best serve the public interest, not to punish Litton for not having taken steps to develop Royal as an independently viable competitor.

Accepting the Commission's holding that compact office electric typewriters should be included in the office electric typewriter submarket (C.O. 26-29), the statistical projection for compact office electric typewriters still does not afford much promise for Litton's ability to compete in the typewriter market overall or in the office electric typewriter submarket.

The office manual typewriter market, measured in units sold, decreased from 465,949 in 1966 to 216,324 in 1972. Royal's unit sales decreased from 187,487 (a 40.2 percent share) in 1966 to 74,360 (a 34.4 percent share) in 1972 (Table 10, *supra*). Measured on the basis of suggested retail list price, the market decreased from $119.3 mikkiorhm 1966 to $53.7 million in 1972. Royal's sales, also measured on the basis of suggested retail list price, decreased from $48.7 million (a 40.9 percent share) to $17.6 million (a 32.9 percent share). In 1972, manuals accounted for only 8.8 percent of the total office typewriter market, computed on the basis of suggested retail list price. (Table 9, *supra*.) Even excluding automatic typewriters, the share is only 11.6 percent (application of Tables 4 and 9, *supra*).[30]

In its opinion (C.O. 30), the Commission held that manuals constituted an economically important submarket and that, while it had lost ground since 1968, the demand was expected to level off. At the time of that opinion, 1968 was the last year for which actual sales figures were available to the Commission. The record on remand now provides sales figures for 1972 which negate the expectancy of a leveling off of demand for manual typewriters.

In units sold, the market from 1968 to 1972 has decreased from 354,351 to 216,324. Based on suggested retail list price, the market over that period has decreased from $90.4 million to $53.7 million. On that same basis, market share has decreased from 19.9 percent to 8.8

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[30] The above analysis is given in terms of suggested retail list price, since this was the measure used by the Commission in computing market share. In terms of revenues realized, a basis more appropriate when appraising the competitive viability of a company, office manual typewriter sales in 1972 were only $31.7 million, 5.7 percent of the total office typewriter sales of $554.7 million (RX 2107, *in camera*). Excluding automatic typewriters, the share was still only 8.1 percent (application of Table 3, *supra*, and RX 2107, *in camera*).

percent (Tables 9 and 10, *supra*). In the face of a uniform and material decline in the sale of manual typewriters since 1966 in units sold, dollar sales and share of the market, there is now no basis for anticipating that sales in this market will level off at an economically important level, at least not one of relative competitive importance in the office typewriter market.[31]

Despite Litton's relatively large share of the manual submarket, that submarket does not afford much promise for Litton's ability to compete in the office typewriter market.

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Royal's total revenues in 1972 from office typewriter sales was $41.8 million (Table 1, *supra*). Its revenues from office electric typewriters was $29.5 million (Table 3, *supra*) of which $13.8 million was from compacts (Table 11, *supra*), leaving $15.7 million realized from standard electric office typewriters. Thus, the direct effect of an order requiring the divestiture of Triumph-Adler would be to reduce Royal's income from the sale of typewriters by $15.7 million annually, 37.6 percent of its office typewriter sales revenues and 53.3 percent of its office electric typewriter sales revenues. Based on 1972 figures, it would be left with annual revenues of $13.8 million from the sale of compact office electrics and $12.3 million from the sale of manual office typewriters. As described above, however, Royal's sales of both compact electric typewriters and manual typewriters have been decreasing, the manual typewriter submarket is itself decreasing at a substantial rate, Royal's share of revenues from the sale of compact electrics has been going down and compact sale of compact electrics has been going down and compact and manual sales account for relatively small shares of the office typewriter market.

The facts recited above reflect what would be the direct and immediate effects if respondent were to divest itself of Triumph-Adler. There is also a question of whether, as an indirect result, Litton would find it expedient, as a matter of good business judgment, also to withdraw from the sale of manual and compact electric typewriters. This question is addressed *infra*, at p. 61 [p.368, herein].

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[31] Complaint counsel argue that the sales figures developed on remand are consistent with what the Commission anticipated in its opinion, pointing out (CPF 19) that the Commission relied upon testimony to the effect that the decline in unit sales of manuals would bottom out at no less than 200,000 per year. The witness relied upon, the Manager of Marketing Services of Olympia, USA, testifying on Mar. 11, 1971, forecast a *gentle decline in the next five to ten years*, bottoming out between 200,000 to 250,000 units annually (Tr. 4902). His forecast can be given little weight in light of the steep decline to 216,324 units by the very next year.

ALTERNATIVES OPEN TO LITTON TO REINSTITUTE COMPETITIVE EFFORTS

Any appraisal of whether Litton would take steps to reinstitute competitive efforts with respect to standard electric and automatic typewriters can only be made in the light of the competitive climate. Therefore, before analyzing the various steps open to Litton, we first examine the competitive situation within which it would have to exercise its options.

Competitive Climate within Which Litton Must Choose

The situation is one of domination by IBM to the extent of making it very difficult for others to compete. In the overall office typewriter market, based on actual revenues, IBM's share has steadily increased from 50.4 percent in 1965 to 77 percent in 1972. Based on suggested retail list prices, IBM's share over this period has increased from 43 percent to 67 percent (Tables 1 and 2, *supra*). Even excluding automatic typewriters, IBM's 1972 share, based on revenues, was 67.5 percent (Table 3, *supra*); and excluding automatics, based on suggested retail list prices, its share increased from 51.7 percent in 1969 to 57.4 percent in 1972 (Table 4).[32]

IBM's 1972 share of the office electric typewriter submarket, based on revenues, was 72.4 percent (Table 3, *supra*). And CX 702, *in camera*, which understates IBM's sales by not including $17.9 million in rentals, shows that, based on suggested retail list price, IBM had 64 percent of the market.

Based on actual revenues, IBM's share of office electric and automatic typewriter sales combined increased from 67.8 percent in 1965 to 81 percent in 1972. Based on suggested retail list price, IBM's share over that period increased from 62.9 percent to 73.9 percent (Tables 6 and 7, *supra*).

The most important consideration is with regard to the type of typewriters with respect to which Litton's competitive efforts would be directly and immediately cut off if it were forced to divest itself of Triumph-Adler. These are standard electric and automatic office electrics. Here, IBM's share of revenues increased from 77 percent in 1965 to 87 percent in 1972 (Table 8, *supra*). Considering automatic typewriters alone, IBM's 1972 share, based on actual revenues, was 89 percent (Table 5, *supra*). Considering standard electric typewriters alone, IBM's 1972 share, based on actual revenues, was 81 percent (application of Tables 3 and 4, *supra*).

While the Commission refused to include reconditioned IBM electric typewriters in the typewriter market for purposes of measuring market shares (C.O. 39), Litton could not, when considering whether to resume competitive efforts, ignore the fact that, in 1972, IBM received $17.9 million on sales and rentals of reconditioned demonstrator electric typewriters to schools and reconditioned used electric typewriters through wholesale distributors (RXs 2007B, 2008B, both *in camera*).[33] How could it ignore the fact that IBM's $17.9 million revenue in 1972 from reconditioned standard electric typewriters alone was greater than Royal's entire revenue ($15.7 million) in that year from standard electric typewriters?

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[32] If Royal were to be divested of its standard electric typewriter, it is assumed that a major portion of its lost sales volume would go to IBM, thus making IBM's share even larger.

Used IBM typewriters suitable for reconditioning[34] are completely overhauled on a regular assembly line in IBM's Kentucky factory where new typewriters are manufactured. This includes replacement of parts, adjustments and repainting. The recons are boxed and sold through three wholesalers who, in turn, sell to key dealer accounts[35] and other dealers who blanket the country (Tr. R. 296-99). More NOMDA dealers sell IBM recons than any other brand of office typewriter (Tr. 6550).

Suitable demonstrators are similarly overhauled on an assembly line in IBM's Kentucky factory. These are sold directly to schools as available. This is about two or three times a year. They sell out in a relatively short period of time (Tr. R. 299-304).

The prices on recons are substantially below those for new IBM typewriters (Tr. R. 302-305, 312). Factory warranties are available (Tr. R. 305, 355-56). IBM is the only company that reconditions and sells its own typewriters (Tr. R. 351-52). These machines are a class apart from used typewriters and compete directly and successfully against other companies' new typewriters.[36]

The competitive dominance and power of IBM which is reflected by the sales figures referred to above is substantiated by other evidence in the record. Indeed, IBM's sales appear to have been somewhat curtailed by an inability to produce up to the level of demand (RX 2026 A-B).

The Commission recognized that IBM was the industry leader in the office electric typewriter submarket and that, from 1903 to 1968, there were eleven other competitors in the typewriter market: Remington, SCM, Royal, Olivetti, R.C. Allen, Triumph-Adler, Olympia, Hermes, Facit, Brother and Nippo (C.O. 12). Allen went out of business in 1970 (C.O. 18). SCM discontinued the manufacture of office manual typewriters in 1970 (Tr. 654). In the same year, it discontinued the manufacture of standard electric office typewriters and concentrated solely on compacts (RX 1193, p. 6). SCM's self-limitation in the office typewriter market is reflected by its reduction in sales, at suggested retail list price, from $20.6 million in 1968 to $13.4 million in 1972 (Table 2, *supra*). Nippo sold only portable typewriters (C.O. 21-22).

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[33] IBM sold over 15,000 reconditioned Selectric demonstrators to schools in 1972. It received some $7.5 million (Tr. R. 339, 334-45, *in camera*).

[34] Typewriters that cannot meet the standards of IBM recons are sold as is (Tr. R. 296-97).

[35] There are over 300 key dealers who are selected on the basis of community reputation, capability of sales force, willingness to expand operations as necessary and willingness to agree to reach specified sales quotas (Tr. R. 296-99).

[36] The president of NOMDA, who also owns an office machine business of his own and carries both Royal and Adler typewriters, explained how the IBM recons compete directly with new Adler and Royal typewriters (Tr. R. 488, 507-08) and how he has lost school business to IBM's recons (Tr. R. 508).

Another dealer, who carries both Adler typewriters and IBM recons, testified that these machines compete against each other on a direct basis (Tr. R. 590-91); that people like the IBM recon, it is well received and is saleable and profitable (Tr. R. 591-92).

Hence, in the office electric typewriter submarket, IBM now has only nine competitors. Based on actual revenues, IBM had a 72.4 percent share in 1972 and its largest competitor was Royal with only 8.1 percent. If Royal were to withdraw, the next largest competitor would be Olivetti with only 6.6 percent (Table 3, *supra*). And if Royal were to withdraw, it is to be anticipated that IBM would get the lion's share of that business. There have been no new entrants into the electric office typewriter market since 1934 (C.O. 43, 44) and none can be foreseen (CPF 437).

As previously recounted, IBM is the fifth largest industrial corporation in the United States and it manufactures in the United States the typewriters it sells here. Its "Selectric" typewriter introduced in 1961, the single most important development in the typewriter industry to date, is still the only single element typewriter on the market and is the standard printer generally used even by its competitors in their automatic typewriters. The large share of the market controlled by IBM by virtue of its Selectric typewriter is detailed *supra*, at p. 35 [p.351 herein].[37]

The Selectric is just one example of improvements and innovations offered by IBM which keep it ahead of its competitors. See C.O. 17 and I.D. 49-50, 185 for descriptions of various features offered by IBM. Subsequent advancements include the Correcting Selectric, the Mag Card Executive and the Mag Card II with electronic memory features (TR. R. 245; RXs 2042, 2046 A-C).[38]

At the end of 1972, IBM had almost 200 branch offices for the sale and servicing of its typewriters. It had some 3,000 salesmen and almost 5,500 typewriter repair engineers (RX 2010 B, *in camera*).

The acceptance of IBM products allows IBM to charge more for its products than its competitors do. Correspondingly, the price of IBM's new typewriters sets the upper limits of competitors' prices (I.D. 178-180).

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[37] In 1969, IBM manufactured 273,280 Selectrics, 144,230 model D standards, and 51,297 model D Executives (RS 632).

[38] Such innovations have meant increased business losses to competitors (TR. R. 519-21).

As the general sales manager for the Sperry Remington Division of Sperry-Rand explained (Tr. R. 211, *in camera*):

> In the typewriter industry IBM is the typewriter everyone wants unless you can provide justification for them to buy something else.
>
> We have attempted to provide price as a justification.[39]

Similarly, Olympia historically has priced its standard electric typewriter at a price below IBM's in order to market the machine. However, because of the devaluation of the dollar in comparison to the German mark from February 1969 to September 1973, the Olympia typewriter, which is made in Germany, has cost 68 percent more landed in the United States. In order to remain competitive with IBM, Olympia was able to increase its prices only by 34 percent, thus substantially reducing its margin of profit (Tr. R. 845-46, *in camera;* RX 2098, *in camera*).

Wang, an automatic typewriter competitor, in a report to the Securities and Exchange Commission in October 1973, stated (RX 2143, p. 13):

> It is generally accepted that IBM dominates the word processing equipment market. Any price reductions or substantial changes in rental terms and discounts offered by IBM in this area will generally have a significant effect on others competing in the word processing market, and may require corresponding reductions in prices and modifications of terms of rental or sales of the Company's word processing products.

Litton, although it claims to have a better automatic typewriter than IBM, anticipates that it will have to price lower than IBM because of IBM's established position in the market (Tr. R. 761).

Redactron, which describes itself as the second largest manufacturer of editing typewriters in the world (CXs 592C, 593E),[40] stated in a November 1972 share-offering prospectus (CX 600Q):

> IBM is the largest manufacturer and distributor of automatic typewriter equipment in the world and has an international sales and marketing force, service facilities and reputation. In view of IBM's position in this market, management believes that the Company will remain a minor factor in the market.

Xerox, which has acquired a printer and is developing an automatic typewriter for entry into that market (Tr. R. 399-412, *in camera*), has never considered entering the office electric typewriter market because it is a replacement market, relatively stable with little present growth (Tr. R. 444-45, *in camera*). This appraisal is consistent with the situation, previously noted, that there have been no new entrants into the office typewriter market (except for the automatic submarket) since 1934.

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[39] Because of increased prices that Remington has had to pay Olympia for German made typewriters following devaluation of the dollar, Remington has had to increase its prices in relation to IBM's. Consequently, Remington's sales have gone down (Tr. R. 211-213, *in camera*).

[40] Based on actual 1972 revenues, IBM had 88.8 percent of the market and Redactron and 1.5 percent (Table 5, *supra*).

The devaluation of the dollar in relationship to the German mark and the Japanese yen has helped add to IBM's dominant position. While IBM typewriters are made in America, many of the competing typewriters come from Germany and Japan.[41] Thus, IBM's competitors that sell German and Japanese made machines have had to pay more for their machines which places them at an increased competitive disadvantage with IBM.

The devaluation of the dollar in relationship to the German mark began in 1969. In 1968, one dollar bought four marks. As of the end of 1972, the dollar was worth 3.2 marks. By Aug. 1973, it had dropped in value to 2.4 marks. In Jan. 1974, the value had gone up to 2.88 marks and as of Mar. 15, 1974, it was down to 2.64 marks. The dollar was worth about 360 yen until 1970, when it started to lose value, decreasing to 302 yen by the end of 1972. For most of 1973 it was worth about 265 yen, went up to 297 yen in Jan. 1974 and decreased to 286 yen as of Mar. 1974 (RRB 56-57, Appendix, Charts I and II; CPF 263, 264; RX 2104 C; Tr. R. 1199).

Using as an example a change of value from four marks for a dollar to two and one half marks per dollar (an exemplification of what occurred between 1968 and August 1973), an importer who, at four to one, had to pay $100 for a German machine would now be required to pay $160. This can be termed a 60 percent increase in dollar cost or a 40 percent decrease in the number of marks to buy a dollar (Tr. R. 1199-1202). The record provides examples of what this has meant to competitors of IBM.[42]

There is insufficient evidence in the record to predict with any degree of assurance whether the devaluation experienced is a long-term or short-term matter or just where the dollar-mark, dollar-yen relationship will settle or in which direction it will go.[43] Suffice it to say that the devaluation as of now is a very real thing, there is nothing to indicate that the monetary relationships will return to their former levels, and the situation is still another factor favoring IBM's continued dominance.

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[41] German or Japanese made typewriters are sold by Paillard-Hermes (Tr. 146-47; RX 1946 Z-8), Olympia (Tr. 710), Remington (RX 1980 C-E, *in camera*), Brother (C.O. 21) and, of course, by Royal and Triumph-Adler.

[42] The following are some of the examples:

Remington was required to renegotiate the price charged it by Olympia of Germany because, in March 1973, the exchange rate for the dollar in marks had gone below 2.9 percent. The price was increased so that Remington, in turn, had to increase its prices in relation to IBM to the point that it lost sales (Tr. R. 178, 211-12, *in camera*; Tr. 194-95; CX 644).

Due to devaluation, the Olympia typewriter, as of September 1973, cost 68 percent more to Olympia in the United States than in 1969. In order to attempt to remain competitive with IBM, Olympia increased its prices only by 34 percent. It was forced to absorb the remaining increase and reduce its margin of profit (Tr. R. 845-46, *in camera*; RX 2098, *in camera*).

Hermes, in July 1973, largely because of the devaluation of the dollar, eliminated two models of office manuals, as well as two portable typewriters, from sale in the United States (RXs 1951 B, 2094; Tr. R. 549-551, 584-85).

[43] Dr. Weston, an economist called by respondent, stated his opinion that the value of the dollar would fluctuate, but that it would settle at a point not much above a three mark value; that the situation with respect to the yen was just about the same (Tr. R. 1204-05, *in camera*).

Keeping in mind IBM's dominance of the office typewriter market to the extent recounted above as well as the limitations of opportunity in the office electric typewriter market as recognized by Xerox, we now consider the alternatives open to Litton in the event it should be required to divest itself of Triumph-Adler.

Alternative 1: Internal Development of Standard Electric Typewriter and Printer for Automatic Typewriter

The Commission has already found that there are formidable technological and marketing barriers to entering the office electric typewriter market, noting the 4-5 years it took Royal and SCM to market their electric typewriters and the more than five years it took Triumph-Adler (C.O. 44).[44] Royal, without Triumph-Adler, would be facing an even greater struggle since it has no research and development capabilities and would have to acquire R&D personnel and facilities before it could even begin to develop its own machines. Estimates of Litton executives that it would take two years to gather an R&D team capable of designing a typewriter and printer and another five to seven years to go through the various stages of design, testing, tooling and factory preparation leading up to production (Tr. R. 945-46, 1098-1100) do not appear to be out of line.

It should also be recalled that, in order to become competitive, Royal would have to develop not merely a printer, but a single element printer; that IBM introduced its "Selectric" single element printer in 1961, and it remains the only single element printer on the market.

The Litton executives' estimates are more than substantiated by the following. It took IBM ten years to develop its Selectric typewriter (RX 652 A). Triumph-Adler, with a qualified R&D staff started on the single element printer in Jan. 1969 and is scheduled to test market the product this year (Tr. R. 1100). Remington, which has been working on a single element typewriter under a licensing agreement with IBM since 1967, still had not marketed such a product (RRB 100). The Diablo printer, which has been acquired by Xerox, was designed in 1969 (RX 2066 A-D, *in camera*). Xerox' automatic typewriter using the Diablo printer is still not on the market (Tr. R. 455, *in camera*), although Xerox acquired the printer in Mar. 1972 (RX 2055, *in camera*). The record demonstrates numerous problems that have developed with regard to the printer which, so far, have kept Xerox from marketing its automatic typewriter (see, *e.g.*, RX 2077 Z-11, Z-13, *in camera;* Tr. R.

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[44] It took Triumph-Adler four years of developmental work before it was able to announce an electric portable typewriter in 1967 (C.O. 8).

468-70, *in camera*). Xerox personnel have had various target dates for introduction of the Xerox automatic ranging from the fall of 1972 to July 1975. Some Xerox personnel feel the correct date is "Never" (Tr. R. 468-69, *in camera*).

IBM spent over $5 million to develop its single element typewriter (RX 652, *in camera*). In 1971, the national typewriter manager of Remington estimated that the cost of producing a workable single element typewriter, even with the advantage of being able to use IBM's patents, would be between $5 to $10 million (Tr. 4591-92, *in camera*). From 1961 to 1966, Royal spent $3.9 million in an effort to design a single element printer. Hardly any progress was made and the effort was scrapped after it was estimated that it would cost Royal as much to manufacture the typewriter as the price for which IBM was selling its Selectric (CX 418, *in camera;* Tr. 4974-75, 5609-10, 7505-06). In 1966, after Litton acquired Royal, Royal developed the 660 standard electric typewriter. This machine, however, was qualitatively unacceptable and was scrapped in favor of the 970 produced by Triumph-Adler (see, pp. 36-37 [p. 352, herein], *supra*).

Testifying in Dec. 1973, the general sales manager of Remington in charge of typewriters gave his opinion that, in view of the investment required, it would be very difficult to get production started in the United States with an office electric typewriter of any type that would be competitive in the United States (Tr. R. 216, *in camera*).

Nevertheless, complaint counsel contend that Litton should be able to develop a new typewriter and printer quickly and inexpensively, and point to OCI and Ancilex as examples of companies that have been able to do so. The president of OCI did testify to the development by his company, in a relatively short period of time and for a relatively small amount of money, of a text editing typewriter (Tr. R. 1642-1650, 1686, 1693; Tr. R. 1653-1664, 1716-1733, *in camera*). Similarly, the president of Ancilex testified to the development, in a relatively short period of time and at a relatively small cost, of a printer suitable for use in automatic typewriters. The printer would be made available as OEM equipment to companies that want to compete in the automatic typewriter market (Tr. R. 1779-81; Tr. R. 1782-1821, *in camera*).

The testimony with regard to the OCI and Ancilex products, however, falls short of describing the marketing of successful products acceptable and competitive with products already on the market. Nor can the absence of such evidence be tempered by the glowing descriptions of the products and predictions of success by the presidents of the two companies. The experiences of IBM, Triumph-Adler, Remington, Xerox and Royal itself are deemed more indicative of the problems, time and monetary expenditures that Royal may anticipate should it endeavor to develop its own typewriter and printer.[45]

As stated by Litton's vice president and group executive in charge of typewriters, "Royal's record of R&D in the past was deplorable. They don't have the capability now. It would be foolish to go back and reinvest millions and millions of dollars and take the time to try to do it with no assurance of success." (Tr. R. 825-26)

Considering IBM's entrenched position of dominance and, in view of the time required, the large expenditures involved and the risk that the products developed may be unacceptable or unprofitable, it is deemed unlikely that Litton, if required to divest itself of Triumph-Adler, would take the steps necessary to develop, produce and market its own standard electric and automatic office typewriters. This is particularly true with respect to electric typewriters where, except for mergers, no new entrants have appeared on the market since 1934.[46]

Alternative 2: Procurement of Typewriter or Printer for Use in Automatic Typewriter from an Outside Source

Litton executives with responsibility for the typewriter area have unequivocally testified that Litton must have control of its own printer; that if Litton lost control of its printer by virtue of the divestiture of Triumph-Adler, good business judgment would dictate against procurement of the printer from a third party supplier and Litton would get out of the typewriter business.[47] Having heard these witnesses, and upon an evaluation of the reasons given as well as other evidence in the record, it is deemed unlikely, as a matter of good business judgment, that Litton, in the event it should be required to divest itself of Triumph-Adler, would remain in the typewriter business by means of securing typewriters and the printer from third party sources.

A prerequisite to a company becoming an effective competitor in the automatic typewriter market is that it have control of its own printer. Otherwise it is at the mercy, for a key part of the machine, of its supplier which, in all likelihood, is or may develop into a competitor (Tr. R. 758-60, 1433-35).[48]

If Litton had to secure a typewriter or printer elsewhere, its price

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[45] Note too that SCM discontinued the production of full-sized office electric typewriters "since the return on further investments required would not meet our standards" (RX 1193, p. 30). RX 2134 P notes several companies that withdrew from the automatic typewriter market due to lack of success. Friden-Singer, the second largest seller of automatic typewriters in 1972, is withdrawing completely from the market by the end of 1974 (Table 5, *supra*). Edityper has withdrawn from that market (RX 2072, p. 45, *in camera*).

[46] This estimate is confirmed by Xerox' decision not to enter any portion of the office typewriter market other than the automatic portion in view of the lack of opportunity in the other submarkets.

[47] Vice president of Litton and group executive, Office Communications Equipment Group responsible, *inter alia*, for typewriters- Tr. R. 757-761, 778, 818-834, 1425-26, 1434-35; executive vice president of Litton, heading the business systems and equipment activities, including typewriters - Tr. R. 958-966, 1139-1140, 1149-1152; chairman of the executive committee of Litton - Tr. R. 1072, 1078-79, 1151-52.

[48] One of the uncertainties considered by Xerox when it decided against acquiring Redactron as a means of entering the automatic typewriter market was the element of risk in that IBM was the sole source of Redactron's

(Continued)

for its typewriter would have to include the supplier's profits or else it would have to reduce its margin of profit. This would place it at a competitive disadvantage, particularly if the supplier were a competitor. In the event of shortages, the supplier-competitor would take care of itself first. There would also be problems of quality control, since Litton could not insure that the product was being manufactured in accordance with specifications (Tr. R. 758-761, 818-823). There is also the possibility that certain suppliers might go out of business, be struck by their employees or have some other crisis whereby they could not make necessary deliveries (Tr. R. 950-52).

There would be insurmountable difficulties in negotiating an acceptable long-term contract for a typewriter or printer. It is impossible to predict what quantities may be required over a long period of time. There is the danger of contracting for too many units or not enough. Then there is the problem of obsolescence. The item contracted for may become obsolete while Litton is still contractually obligated to continue to accept deliveries of an unwanted product. Litton would have to renegotiate with suppliers for advanced products, if it could, to keep competitive.[49] Because of inflation, or fluctuations in monetary exchange rates if the supplier is a foreign company, prices cannot be set absolutely for long periods, but must be subject to renegotiation. Such renegotiation, while Litton is dependent upon continued supply, would place the supplier in the driver's seat capable of imposing burdensome conditions upon Litton.[50] Retooling must take place periodically and the costs involved would again place the contractual relationship in limbo (Tr. R. 818-824).

In case of breach of contract, while Litton could sue on the contract, this would not serve to supply Litton with the necessary product while the suit was underway (Tr. R. 821-23).

These problems have all been experienced by Litton and others. Sperry-Rand (Remington) had a supply contract for typewriters with Olympia which provided that the parties would renegotiate price if devaluation went beyond a particular point. The point was reached, price was renegotiated at a higher level and Sperry-Rand's profits

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typewriter (RX 2064 G, *in camera*).

CPT Corporation, while it believed it could rely on IBM to supply the required typewriter, recognized that "discontinuance of supply for any reason could have a material adverse effect on * * * [its] operations" (RX 2118 K, *in camera*).

Wang also recognized its dependence upon its suppliers and the adverse effect a failure of adequate deliveries might create. It then noted that it was wholly dependent upon IBM for its electric typewriters which it described as "an essential element of the Company's word processing equipment [automatic typewriter]" (RX 2143, p. 12). See also CX 600 J (Redactron's estimate of reliance upon IBM).

[49] It goes without saying that competitors are not about to cancel or amend contracts voluntarily in order to supply Litton with their latest innovations. Litton would always be a step or two behind. Litton could never be a leader.

[50] Litton would be in the same disadvantageous position when it was negotiating with a supplier for a needed improvement or innovation.

were reduced (Tr. R. 193-96; RX 1980 B, *in camera*). Olympia refused to ship as many typewriters as Sperry-Rand required. The contract didn't provide for enough. This resulted in loss of customers (Tr. R. 208-210, *in camera*). Sperry-Rand recognizes that it could well use the profit Olympia is making on it (Tr. R. 209, *in camera*). Sperry-Rand is also purchasing a typewriter from IBM for use in an automatic typewriter. IBM is charging top dollar and Sperry-Rand is trying to develop its own printer in order to be more competitive and flexible pricewise (Tr. R. 206-07, *in camera*).

Litton has been marketing calculators made for it by a Japanese firm. However, it has not been able to secure the quantities it requires (Tr. R. 926-28). It is also having quality and price problems with respect to a Japanese supplier of calculators. The product is being phased out because of these problems. (Tr. R. 1371-72, *in camera*). Another Japanese supplier of plain paper copiers has refused to comply with contract specifications regarding price and a new product and has insisted upon renegotiation. Because of uncertainties in this matter, Litton may be forced to drop this product (Tr. R. 1026-29, 1044-45, 1401-04, 1410-11, all *in camera*).

In the field of typewriters itself, Litton had a contract with a Japanese manufacturer of flat portable typewriters calling for 50,000 per year. Four months after operations under the contract, the supplier stated it would not deliver unless it got more money. When Litton tried to enforce the arbitration clause in the contract, the supplier stated that, if sued, it would go out of business. Under such compulsion, Litton agreed to a price increase. The supplier then cut down its deliveries to 30,000 per year claiming it could get more money elsewhere (Tr. R. 823). Subsequently, the supplier insisted on still more money despite the contract (Tr. R. 1409-1411, *in camera;* RX 2146 A-B, *in camera*). Litton's other Japanese supplier of portable typewriters has also insisted on a large price increase despite contract provisions. Consequently, the contract for certain typewriters is being terminated (Tr. 1413-14, 1422, *in camera*).

Printers that could be used are limited to those of IBM, Olympia, Triumph-Adler and Xerox' Diablo (Tr. R. 824-25, 958-59).[51] These companies, however, are all competitors or potential competitors and they could not be relied upon to supply Litton with their most up-to-date and competitive products. Also, because of the limited number of suppliers, Litton could not negotiate a favorable contract (Tr. R. 825).

IBM gets top dollar even when selling on an OEM basis (Tr. R. 207; CX 600 J), and does not bind itself by contract (CX600 C; RX 2118K).

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[51] The possibility of planning to secure presently needed supplies from untested companies such as Ancilex and OCI has already been discounted.

As noted above, Olympia is under contract to supply Sperry-Rand, so there is some question whether it could take on another account, particularly since it has been unable to supply Sperry-Rand with all of its requirements. Further, as already recounted, Olympia has had to raise its prices to Sperry-Rand because of the devaluation of the dollar in relationship to German currency and this has cut into Sperry-Rand's profits. Olympia's expenses in selling its own product in the United States went up by 68 percent because of the change in the German-American exchange rate and it had to absorb half of this price increase out of its own profits in order to remain competitive with IBM (Tr. R. 845-46, *in camera*).

The same problem of negotiating a workable price would exist with regard to Triumph-Adler, which also manufactures in Germany and is confronted with the unfavorable German-American monetary exchange rate. Indeed, for fiscal year ending July 31, 1973, Litton suffered a loss, based on factory cost, of $23.29 for each model 970 secured from Triumph-Adler that it sold in the United States (Tr. R. 681, 683, *in camera*, 1445; RX 2150, *in camera*). From Aug. 1, 1973 to Dec. 1, 1973, the loss was $55.93 per unit (RX 2148, *in camera;* Tr. R. 1452-53, 1458).[52] Even excluding nonoperating expenses, the allocation of which complaint counsel question, Litton lost $6.12 on every model 970 typewriter it sold from Aug. 1, 1973, to Dec. 31, 1973 (RX 2148, *in camera*). In view of such losses on the resale of typewriters supplied by Triumph-Adler computed at factory cost, it is not likely that Litton could negotiate a price with Triumph-Adler where Triumph-Adler could make a fair profit and Litton could still compete on the resale of the typewriter in the United States.

As for Xerox' Diablo printer, Xerox itself is holding up indefinitely the marketing of its automatic typewriter because the printer is not acceptable (Tr. R. 468-470, *in camera;* RX 2077 Z-11, Z-13, *in camera*). Under such circumstances, Litton could not be expected to try for the Diablo. Further, it is doubtful whether Xerox, if it should become a competitor, would furnish Litton with its improved versions.

This is a problem appropriately perceived by Litton's executive vice president with respect to any competitor supplying products. Competitors would be prone to supply something that is ready to become obsolete when they are ready to introduce the next generation of printers. This is a field where development is rapid. A company that purchases from a competitor would always be at least a generation behind (Tr. R. 959-960, 966).

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[52] Complaint counsel have questioned respondent's method of arriving at the loss. The loss, however, was computed from official books and records of Litton as kept in the regular course of business, books used for auditing purposes, reporting to the S.E.C. and Internal Revenue. The auditing manager of Litton who computed and testified to the losses explained his accounting methods in detail and stated that he had followed accepted accounting procedures (Tr. R. 643-44, 1483-84, 1552, 1567-69, 1573-74). Complaint counsel introduced no witness to controvert the testimony of respondent's expert.

Complaint counsel contend that the cost of moving manufacturing facilities from Hartford, Conn., to England was an unusual expense and helped reflect a loss when in fact, apart from the cost of the move, there would have been a profit. The cost of the move, however, is reflected in fiscal year ending July 1972 (CX 711, *in camera*) and we are here concerned with losses incurred after that time.

It may thus be concluded that, if forced to divest itself of Triumph-Adler, Litton, as a matter of good business judgment, would be unlikely to acquire a typewriter or printer from a third party source.

* * * * * * *

There is still another reason why, if forced to divest itself of Triumph-Adler, it is not reasonable to expect that Litton would take steps to get back into the mainstream of competition, *i.e.*, standard electric and automatic typewriters.

As Litton's executive vice president testified, Litton would not go into the automatic typewriter business on any basis that did not provide for production under economies of scale (Tr. R. 962). In order to compete against IBM, economies of scale are essential for survival (Tr. R. 972).

Even if Litton were to reopen its Hartford plant, it doesn't sell enough manual or electric typewriters in the United States to be profitable (Tr. R. 974-75). Litton's requirements for a 970 type machine are only about 50,000 per year and it could not achieve enough economies of scale at that level to be competitive (Tr. 1149-1150). On the other hand, with Triumph-Adler it does have certain economies of scale and is planning moves to achieve even more (Tr. R. 762-63, 869, 870, 898-99, 956-57, 971-72, 1144-46, 1151).[53]

Alternative 3: Termination of Manual and Compact Electric Typewriter Production

A third alternative open to Litton is that of not only staying out of the standard electric and automatic portions of the market, but of also withdrawing from the production and sale of manual and compact electric office typewriters.

As of Apr. 1969, Royal's only typewriter manufacturing or assembly plant was in Hartford, Connecticut. The plant produced primarily office manuals. In July 1972, all typewriter production and assembly was stopped in Hartford and was transferred to Royal's plants in England. Royal's production of manual and compact electric typewriters is now confined to factories in England and Amsterdam (C.O. 5, 13 n 9; I.D. 45; Tr. R. 788-90, 911-12, 919-920, 1112-14).

At the time of moving the Hartford facilities to England, consideration was given to closing down the entire Royal typewriter operation. Estimates of between $64.5 million to $90 million were made as to the cost of doing so (Tr. R. 796, 805-813, 993-98, 1056-59, 1075-77).

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[53] The above is noted, not as a finding of countervailing power to justify a merger, but simply as a finding that, if divested of Triumph-Adler, it is unlikely that Litton would undertake the expensive steps to compete in the areas in which it depended upon Triumph-Adler.

Litton's vice president and group executive in charge of Royal estimates that the total cost now would be only $30 million to $40 million which would be offset by the sale of properties; that having moved production from Hartford to England with lower penalties for discharging employees, lower material costs, lower leasehold obligations and with a saleable international business, European Royal is now a marketable commodity which would offset the cost of closing (Tr. R. 916, 1090-91).

As explained by the same Litton executive, Litton could phase out its international operations at a profit. Right now the international market is doing well, but within five to ten years Litton's products will be obsolete. There will be need for a single element machine and other products to keep competitive. If Royal lost Triumph-Adler's R&D, now would be a good time to sell its foreign business (Tr. R. 826-27). This is what he is recommending (Tr. R. 834, 1139-1140; see also, Tr. R. 1116-17).

Royal maintains 59 direct sales branches for office typewriters (Tr. R. 751-52). It also distributes through some 900 office machine dealers (Tr. R. 536, 901). The normal office machine dealer carries only one brand of office typewriter (Tr. R. 487, 536-37). The only Royal typewriter worth carrying by an office machine dealer is the model 970. A dealer could not stay in business with the Royal manual as there is not sufficient call for it (Tr. R. 503, 509-10, 611). Similarly, without the model 970, Litton could not maintain its direct sales force (Tr. R. 758; see also, Tr. R. 966-68, 970). It thus appears that if Royal were to lose the model 970 typewriter, it would be hard put to distribute its manual and compact electric typewriters in the United States.

It is concluded, therefore, that if Litton were required to divest itself of Triumph-Adler, not only is it unlikely, as a matter of good business judgment, that it would take steps to produce or acquire standard electric and automatic typewriters, but it may also be anticipated that it would withdraw from the sale of manual and compact electric typewriters.[54]

* * * * * * *

Notwithstanding all of the above, complaint counsel contend that, in light of Litton's overall diversified corporate strength, its expenditure of $3.6 million over the past several years to develop an automatic typewriter and the outlay of over $24 million in 1972 to move its typewriter manufacturing facilities from Hartford, Connecticut to England, it is committed to remain in the typewriter business (CPF 282, 312-13, 401). This ignores the facts (1) that the expenditures for developing the automatic typewriter were made with the assumption that the Triumph-Adler printer was to be an integral part of that machine, and (2) that the move from Hartford to England was one of retrenchment rather than expansion. By the move, Litton avoided labor problems, cut down labor costs, closed down an uneconomical plant and utilized plant capacity in England that was going to waste (Tr. R. 788-790, 976-79).

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[54] This conclusion is also reached upon reflection of the relative unimportance of manual and compact electric office typewriters to the entire office typewriter market and Royal's steadily decreasing success in selling such typewriters in the United States.

As of Dec. 1973, Litton was in the process of liquidating four divisions with combined assets of $52 million because they were unprofitable. In addition, under a program instituted in 1972 of divesting itself of activities not deemed to be in the mainstream of its business, Litton has sold 13 divisions for some $140 million (Tr. R. 1059). There is no basis, therefore, for complaint counsel's position that Litton is committed to remaining in the typewriter business. This is particularly so since Litton's typewriter operations have been conducted at a loss.[55]

Documentary evidence introduced by Litton through Anthony Lonardo, auditing manager of its Office Communications Group, shows that the Royal-Imperial Division of Litton, which includes Royal-U.S. and the typewriter plants in England, incurred losses of $12,475,000 in 1971, $35,560,000 in 1972 and $11,990,000 in 1973 (RX 1920, *in camera*). Mr. Lonardo explained in detail how RX 1920 was computed, that it was derived from the books and records kept by Litton in its normal course of business[56] and that good accounting practices were followed in all instances (see, *e.g.*, Tr. R. 643-44, 648-651, 655-59, 664-66, 1477-1485; Tr. R. 1498-1511, 1527-28, 1543-1551, 1567-69, *in camera*). There is nothing in the record to controvert Mr. Lonardo's testimony.

Complaint counsel (CPF 385) object that RX 1920, *in camera*, does not reflect profits realized by the Royal-Imperial Division on copiers. Such profits are properly excluded for our purposes since we are interested in Royal's profits or losses on typewriters. The exhibit, however, does include losses on adders and calculators which should be disregarded in arriving at the picture with regard to typewriters. Complaint counsel have computed the losses on adders and calculators (CPF 390). While complaint counsel's calculations appear to be based, in part, upon unsupported assumptions and have some internal inaccuracies and inconsistencies, even applying complaint counsel's results, we have the following:

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[55] It is noteworthy that complaint counsel recommend that respondent get out of the portable typewriter market when they advise that Royal's "basic losses could be excised by closing its Consumer Products Division, a continual loser" (CPF 392).

[56] The books and records were made available to complaint counsel.

	FY 1971	FY 1972	FY 1973
Loss shown on RX 1920, *in camera*	$12,475,000	$35,560000	$11,990,000
Less loss on adders and calculators contended for by complaint counsel	1,814,000	4,385,000	3,776,000
Loss on typewriters	$10,661,000	$31,175,000	$8,214,000

The $24,459,000 loss realized in 1972 by virtue of moving facilities from Hartford to England is an unusual one-time expense and should be excluded when appraising Royal's typewriter profit picture. Thus, the losses arrived at, applying the exclusions contended for by complaint counsel, are $10,661,000 in 1971, $6,716,000 in 1972 and $8,214,000 in 1973.[57]

PUBLIC INTEREST IN LITTON'S WITHDRAWAL FROM OFFICE TYPEWRITER MARKET

Withdrawal from Entire Office Typewriter Market

We have seen that IBM is the dominant factor in the office typewriter market in terms of its overall share and increasing strength (particularly in those portions of the market which are most important), in terms of its ability to set pricing levels, in terms of its technological superiority as evidenced by its Selectric typewriter, and on the basis of its vast sales and service system; that IBM dominates to the extent of making it very difficult for others to compete.

At CPF 430, complaint counsel refer to past opportunities Litton had "to develop an office electric typewriter which would be competitive with the IBM products." Again, at CPF 433, complaint counsel speak in terms of Royal's and Adler's capability "to provide competition to IBM in the various typewriter lines." These statements accurately reflect the record to the effect that competition in the office typewriter market narrows itself down to an effort by others to compete with IBM. (See, *e.g.*, pp. 48-49 [p. 360-61 herein], *supra.*)

On the basis of a statistical analysis alone, it must be concluded that it would be anticompetitive and against the public interest if Litton were to withdraw from the office typewriter market. In the total market, IBM's share in 1972, based on suggested retail list price, was

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[57] It is recognized that the above computation mixes figures utilized by respondent's and complaint counsel's different approaches to the evaluation of Royal's losses and that complaint counsel, if they were to follow respondent's method, might contend for larger losses for adders and calculators. The computation is nevertheless deemed adequate to demonstrate that Royal's typewriter endeavors have not been profitable for the past three years.

67.4 percent. Royal was second with 9.4 percent and Olivetti was third with 6.8 percent (Table 2, *supra*). If Litton were to withdraw from the entire office typewriter market, it would mean the loss of IBM's largest competitor with the likelihood that IBM would acquire the lion's portion of Litton's share and so be even more dominant. The loss of Royal's competitive effort reflected by its 9.4 percent share of the market would be more anticompetitive than the loss of Adler's independent anticompetitive effort and the merger of its 3 percent share with the Litton effort.[58]

Cessation of Efforts to Compete in Automatic Submarket

The automatic typewriter submarket has already been found by the Commission to promise increasing growth and importance in future years (C.O. 33). This is the area perceived by Xerox to promise the greatest growth and profit opportunity (Tr. R. 444-45, *in camera;* RX 2072, pp. 17, 48, 83, *in camera*). In this submarket, in 1972, IBM had 88.8 percent of all revenues received. Its dominance is further reflected by the fact that the company with the second largest share of revenues, Friden-Singer with 6.3 percent, is withdrawing from the market, leaving Ty-Data and Redactron as the next largest competitors with but 1.6 percent and 1.5 percent of revenues, respectively (Table 5, *supra*).[59] Further, Redactron which, by November 1972, described itself as the second largest manufacturer in this submarket, predicted that it would remain a minor factor because of IBM's dominant position (CX 600 Q).

As the Commission found, IBM's Selectric printer has become the standard printer in the automatic typewriters of its competitors (C.O. 17; I.D. 49). This situation still exists (RPF 55, 79, 84, 85, 86, 92, 93, 95, 96, 99, 100, 102, 104; CPF 170, 177, 182, 185, 189, 365).[60]

Given a situation where the automatic typewriter submarket is so dominated by one firm and where its competitors are dependent upon it for the use of its printer, it would be procompetitive and in the public interest for the appearance of a new entrant not dependent upon that dominant company and with an established distribution system. Royal is such a potential entrant provided it can keep Triumph-Adler and utilize the Triumph-Adler printer.[61] The effect of an order requiring

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[58] The same conclusion must be reached upon a statistical analysis of the total office typewriter market for 1972 (exclusive of automatics), based on suggested retail prices. Here IBM had 57.4 percent of the market and Royal and Olivetti were distant second and third largest competitors with 12.4 percent and 9 percent shares, respectively. (Table 4, *supra*.) Adler's share was 4 percent. (Table 4, *supra*.)

[59] As noted on Table 5, respondent contends that only about one-half of Friden-Singer's sales in 1972 were of automatic typewriters as that term is defined in the Commission's opinion, so that its share was only some 3 percent.

[60] All but one of the firms in the automatic typewriter market are using a printer made by another firm in the office electric typewriter market (CPF 437).

[61] There is no horizontal merger of market shares here to be considered. Neither Royal nor Triumph-Adler presently are in the automatic typewriter submarket.

Litton to divest itself of Triumph-Adler would be to remove Royal as a potential entrant, an entrant that is sorely needed.[62]

Withdrawal From Office Electric Submarket

The office electric submarket of the office typewriter market was found to be the most important segment of the typewriter industry in the 1960's, both in terms of total dollar sales and market growth. The dollar value of office electric typewriters sold in the United States increased from $162.9 million in 1963 to $307.2 million in 1968 (C.O. 37). By 1972, the dollar value, computed at retail list price, had increased still further to $399.8 million. IBM's share of this market, measured in terms of retail list price, was 64 percent.[63] Royal ranked second with 9.9 percent followed by Olivetti with 8.4 percent (CX 702, *in camera*).

Again we have a situation where IBM dominates the submarket and sells 10 times more worth of typewriters than its closest competitor. If Litton were to withdraw from the office electric typewriter submarket, it would mean the loss of IBM's largest competitor with the likelihood that IBM would acquire the lion's share of what Litton previously had so as to be even more dominant. The loss of Royal's competitive effort reflected by its 9.9 percent share of the market would be more anticompetitive than the loss of Adler's independent competitive effort and the merger of its 3.6 percent share with the Litton effort (CX 702, *in camera*).

The loss of Litton's competition in this submarket would be particularly hard-felt since it would be irreplaceable. Barriers to entry in the office electric typewriter submarket are formidable. No domestic manufacturer has entered the United States typewriter market other than by acquisitions (except for automatics) since 1934 (C.O. 43, 44). And, except for automatic typewriters, there are no new entrants in the wings (CPF 437). It is clear, therefore, that it would be anticompetitive and against the public interest if Litton were to withdraw from the electric submarket of the office typewriter market.

The same conclusion would be reached if Litton were to withdraw only from the standard electric portion of the electric submarket, but were to continue the manufacture and sale of compact electrics. Litton's 1972 revenues from office electric typewriters were $29.5 million of which $15.7 million or 53.3 percent was from standard office electric typewriters (application of Tables 3 and 11, *supra*). The loss of more than 50 percent of Litton's competitive effort in the electric submarket would still be greater than the loss of Adler's independent competitive effort by virtue of the merger.

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[62] The President of OCI, a company that is planning to market an automatic typewriter perceived a benefit to his company if Litton were allowed to keep Triumph-Adler. It was that "any competition against IBM is helpful. * * * It is difficult for a small company to convince anyone you are for real if only IBM is in the market" (Tr. R. 1693).

[63] This share is approximately the same as in 1963. It does represent an increase from 58 percent in 1968. An obvious reason why IBM's share has not increased in this submarket is its large sales of automatics which can be used in place of standard electric typewriters.

Withdrawal from Manual Portion of Market

If Royal were to withdraw from the manual submarket of the office typewriter market, it would reduce the number of competitors in that submarket from seven to six and allow the six remaining smaller competitors to fight for Royal's leading 32.9 percent share (Table 9, *supra*). At the same time, whatever competitive impact Litton's sales of manual typewriters might have on the overall office typewriter market would be lost.

If Litton should not withdraw from the manual submarket, its share, if allowed to keep Triumph-Adler, based on 1972 figures, would increase from 33 percent to 40 percent (Table 9, *supra*). As previously developed, the manual submarket is becoming increasingly unimportant, both relatively and absolutely. Litton's sales too are rapidly decreasing. The public interest would be much better served by allowing such an increase in concentration in this relatively unimportant market than by having Litton withdraw from all or a major portion of the electric submarket and losing Litton's potential competition in the automatic submarket.[64]

As previously developed, the direct effect of an order requiring the divestiture of Triumph-Adler would be to stop Litton from selling standard electric typewriters, the type of machine that, in 1972, accounted for 89 percent of all revenues in the office electric typewriter submarket and 57 percent of revenues from all office typewriters in the United States. It would also stop Litton's effort to enter the automatic typewriter submarket which, in 1972, accounted for 32 percent of all revenues realized from office typewriters. Thus, Litton would be precluded from selling those typewriters that accounted for 89 percent of all revenues received from the sale of office typewriters. This competition would be precluded in the face of the fact that IBM's 1972 share of revenues from automatic typewriters was 89 percent while its share of revenues from the sale of standard electric typewriters was 81 percent; that IBM's share of revenues from standard office electric and automatic typewriters combined increased from 77 percent in 1965 to 87 percent in 1972.

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[64] The same reasoning is applicable to the portable typewriter market. There, the latest evidence shows that, in 1968, SCM accounted for 50 percent of a $178 million market, Royal was second largest with 21.5 percent and Adler ranked seventh with 1 percent (C.O. 42). Again, it would be of far greater public interest to have Litton continue as a competitor in the electric submarket of the office typewriter market and actually enter and provide competition in the automatic submarket than it would be to preclude the increase of its 21.5 percent share in the portable typewriter submarket by 1 percent.

This is particularly true since Royal does not manufacture its own portable typewriters and has cut down on the number of portable models imported from Japan into the United States (Tr. R. 815-16, Tr. 1030-31, *in camera*). The record further indicates that it is having trouble securing adequate numbers of portables from its two Japanese suppliers and is about to cancel its contract with one of them (Tr. R. 1410-14, 1422, *in camera*). Since SCM manufactures in the United States, Royal currently is subject to the problems related to the devaluation of the dollar in relationship to the yen in attempting to compete with the market leader. (See, pp. 49-51 [pp. 361-62, herein], *supra*.)

Complaint counsel's advice to respondent is to close "its Consumer Products Division [which includes portable typewriters], a continual loser" (CPF 392). Portable typewriters were also a loser in 1968 (C.O. 6).

Even if Litton were to continue to sell manual and compact electric typewriters it would be, in the case of manuals, in a relatively unimportant and steadily declining market and, in the case of compact electrics, it would be selling a product where Litton's sales and shares have been steadily decreasing.

Possibility of Diminution of Triumph-Adler's Competitive Effort

In evaluating the anticompetitive effect of Litton's withdrawal from the market, comparison has been made between Litton's competitive impact and that of an independent Triumph-Adler. In so doing, it has been assumed that if Triumph-Adler were divested, it would continue its competitive efforts in the United States to at least the degree reflected by its past achieved sales and market shares. Respondent, however, contends (RPF 181) that if Triumph-Adler became an independent company, the dedication of new management to remain in the United States market would have to be questioned-this because of IBM's dominance in the United States and Triumph-Adler's ability to make more money on its typewriters on sales outside of the United States.

Consideration must be given to the incentives for Triumph-Adler to remain in and become a more substantial factor in the United States market. In doing so, however, little weight is given to whether Triumph-Adler is owned by Litton as opposed to being owned by another company or becoming independent. Litton is not viewed as an altruistic entity dedicated to continue Triumph-Adler's American efforts in the face of better profit opportunities elsewhere. It is assumed that the extent to which Triumph-Adler will expend its efforts in the United States market will be determined by the exercise of good business judgment, regardless who owns or controls Triumph-Adler.

Triumph-Adler lost $151,000 on the sale of its heavy duty office electric typewriter model 21 D in the United States in fiscal year ending July 31, 1973, a loss of $4.50 per unit.[65] During the same period of time, it made a profit of $2,342,000 on sales of the same model typewriter in West Germany, or $53.21 profit per unit (Tr. R. 700-02, *in camera*). For the same fiscal year, Triumph-Adler lost $549,000 on the sale of office manual typewriters in the United States, or a $31.86 loss per unit (Tr. R. 713-14, *in camera*).[66] During the same period, it lost

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[65] On sales of this model to schools, the loss was $261,000, or $37.84 per unit. On sales to commercial accounts, the profit was $110,000, or $4.13 per machine (Tr. R. 709-713, *in camera*).

[66] On sales of this model to schools, the loss was $396,000, or $36.18 per machine. On sales of this model for commercial use, the loss was $153,000, or $24.29 per machine (Tr. R. 718-720, *in camera*).

$18,000 on sales of its manual typewriters in West Germany, or $.91 per unit loss (Tr. R. 721, *in camera*).

By 1963, Triumph-Adler had control of the major portion of the German market and was supplying about 45 percent of Europe's typewriter requirements. In 1969, it sold 28 to 30 percent of the office electric typewriters sold in Germany, 50 percent of manual office typewriters and over 40 percent of the standard manual and flat portables sold there. It sold in over 100 markets around the world. However, to avoid being too dependent on any one foreign market because of fluctuations and in order to realize the highest revenue from its products, Triumph-Adler has a policy of not exporting more than 60 to 65 percent of its typewriters outside of Germany (C.O. 6; I.D. 60).

There is, therefore, a distinct possibility of a diminution of Triumph-Adler's efforts in the manual and electric submarkets of the United States office typewriter market, so that Litton's continued presence in these submarkets is of even greater public interest.

Effect on Independent Office Machine Dealers Carrying Royal Typewriters

Some 900 independent office machine dealers carry Royal office typewriters (Tr. R. 536, 901). Normally only one brand of office typewriter is carried by an office machine dealer (Tr. R. 487, 536-37). The cornerstone of the dealer's business is the typewriter. Without it there is no business (Tr. R. 495). From 25 to 50 percent of the dealer's volume is generated from service revenue (Tr. R. 486). Carrying a typewriter establishes the dealer's credibility as a knowledgeable person in that segment of the industry. Typewriter maintenance can support the dealer's service department since it accounts for more than half of his service business. The sale of typewriters, coupled with service agreements entered into at time of sale, goes far to support the dealer's service department. Without a typewriter, the dealer is apt to be unable to support his entire service department (Tr. R. 498).

If Royal were no longer to furnish office typewriters, its dealers would be hard-put to find replacement machines. There are a limited number of brands, and competitors already have their dealer networks. It would be unreasonable to expect them to add former Royal dealers who would duplicate and compete with existing outlets. Competitors' present dealers would not stand for it (Tr. R. 499, 607-08). It may be anticipated, therefore, that if Litton were to stop distributing typewriters by reason of being required to divest itself of Triumph-

Adler, many of its present office machine dealers would be forced out of business[67] or would otherwise suffer severe business losses.[68]

In light of the foregoing, in the context of the other findings and considerations in this matter, it is not deemed to be in the public interest for the Commission to order Litton to divest itself of Triumph-Adler, where it is probable that the effect of that order would be to force hundreds of Royal office machine dealers out of business.

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In summary, it would be anticompetitive and against the public interest for Litton to withdraw from the office typewriter market and to stop its efforts to enter the automatic submarket of that market. It is to be anticipated that, in the exercise of good business judgment, Litton would withdraw from the office typewriter market and terminate its efforts to enter the automatic submarket thereof if it were required to divest itself of Triumph-Adler. An order requiring such a divestiture, therefore, would itself be anticompetitive and not in the public interest. Even if, following a required divestiture of Triumph-Adler, Litton should remain in the manual submarket and the compact portion of the electric submarket, the anticompetitive effect and adverse impact on public interest with respect to the remainder of the market would far outweigh any procompetitive results with respect to the narrow and relatively unimportant segments in which Litton might remain.

RECOMMENDATIONS

On the basis of the foregoing analysis and findings, it is recommended that the Commission modify its order of Mar. 13, 1973, by *rescinding* that portion which requires Litton to divest itself of Triumph-Adler.

In making this recommendation, the undersigned has considered and deemed unacceptable complaint counsel's suggestion (CPF 446) that divestiture be ordered, but that the Commission "permit the divested Triumph-Adler to supply the model 970 to Royal for five years from the date a divestiture order is entered."

Such an order would assume that Litton, as a matter of good business judgment, would undertake to establish an adequate R&D staff and rebuild necessary production facilities. Litton, however, has no assurance that it can develop a competitive typewriter and printer, particularly one that would justify the large expenditures that would be involved.

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[67] The president of NOMDA estimated that most Royal dealers would be put out of business (Tr. R. 496, 501-03).

[68] On the other hand, if Litton stays in business and merchandises its automatic typewriter, it plans to utilize Royal dealers for both sales and service of the machine (Tr. R. 763-66, 830, 899-901, 1111; RX 2103, *in camera*).

Litton is now losing some $55 on every model 970 typewriter that it sells. This loss does not take into account any manufacturing profit to Triumph-Adler. An independent Triumph-Adler would insist on a reasonable profit on any product sold to Litton. This, in turn, would add appreciably to Litton's losses on the model 970 and make complaint counsel's suggestion even less feasible. All of the problems discussed *supra*, pp. 54-59 [pp. 364-68 herein] with regard to relying upon a third party competitor for a typewriter and printer would apply equally to Triumph-Adler being the supplier and dictate against complaint counsel's suggested solution. Litton would have the additional disadvantage that, after five years of continued promotion of the model 970, it would have to convert dealer and consumer acceptance to whatever Litton might come up with in the way of a typewriter, if anything.

Finally, complaint counsel's suggestion poses practical problems with regard to the divestiture of Triumph-Adler in that a prospective purchaser could only be offered a company which had material obligations over a five year period to a competitor. While complaint counsel's suggestion was that the Commission "permit" the divested Triumph-Adler to supply Litton with the model 970, such a "permit" would be worthless to Litton. It would require a series of contractual obligations, not only as to the model 970, but as to new generations of typewriters and printers, including the much needed single element printer.

It is specifically recommended that the portion of the order which proscribes the acquisition by Litton for ten years of any concern engaged in the manufacture of typewriters or typewriter parts or accessories, without prior approval by the Commission, remain in effect.

In 1969, Litton was the 39th largest industrial corporation in the United States. Its sales increased from $3 million in 1954 to $1.9 billion in 1969.[69] Nearly half of its growth during that period was attributable to acquisitions. It entered the typewriter industry in 1965 by acquiring Royal-McBee Corporation, then the second largest typewriter company in the United States. Subsequently, it acquired Willy Feiler in Germany, Imperial in England and, most recently, Triumph-Adler.

The recommendation to continue in effect the moratorium against acquisitions is made in consideration of Litton's propensity to achieve growth through acquisition, its history of acquiring typewriter companies including Triumph-Adler, which acquisition the Commission has found to violate Section 7, the small number of competitors in the typewriter industry and the high barriers to entry that exist (with the exception of the number of relatively insignificant new competitors in the automatic submarket).

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[69] In the six months ending Jan. 31, 1972, its sales were $1.2 billion and its assets as of Jan. 31, 1972, were over $1.96 billion (RX 2165 B, C).

ORDER MODIFYING CEASE AND DESIST ORDER

On Apr. 9, 1973, pursuant to Section 3.55 of the Commission's Rules of Practice, respondent filed with the Commission a petition for reconsideration of the order entered in this matter on Mar. 13, 1973, which required respondent to divest the assets of Triumph-Adler, and not to acquire, for a period of 10 years without the Commission's prior approval, any concern engaged in the business of manufacturing typewriters. By order dated May 16, 1973, the Commission reopened the proceedings solely for the purpose of reexamining the question of relief in its entirety, and remanded the matter to the administrative law judge to conduct hearings and to furnish the Commission with his findings and recommendations on the issue of relief.

After hearings, the administrative law judge filed "Findings on Issue of Relief and Recommendations on Remand," with the recommendations that the Commission order of Mar. 13, 1973, be modified by rescinding the provision requiring respondent to divest Triumph-Adler, but that the moratorium against acquisitions continue in effect. Complaint counsel filed an appeal from the former recommendation, and the matter was heard by the Commission on briefs and oral argument of counsel.

The Commission having duly considered the administrative law judge's recommendations, and the briefs and argument of counsel, has determined for the reasons set forth in the accompanying opinion that the order should be modified in accordance with the recommendations of the administrative law judge. Accordingly,

It is ordered, That the Commission order to cease and desist and order of divestiture entered in this matter on Mar. 13, 1973, be, and hereby is, stricken and the following order substituted:

ORDER

It is ordered, That respondent for a period of ten (10) years from the date on which this order becomes final shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the normal course of business) of any concern, corporate or non-corporate, engaged at the time of such acquisition in the business of manufacturing typewriters or typewriter parts or accessories for sale within the United States without the prior approval of the Federal Trade Commission.

The prohibition shall include, but not be confined to, the entering into of any arrangement by respondent pursuant to which respondent acquires the market share in whole or in part of such concern in any of the aforesaid product lines, (a) through such concern discontinuing manufacturing, or selling any of said products under a brand name or label it owns and thereafter manufacturing or distributing any of said products under any of respondent's brand names or labels, or (b) by reason of such concern discontinuing manufacturing any of said products and thereafter transferring to respondent customer lists or in any other way making available to respondent access to customers or customer accounts.

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, and every sixty (60) days thereafter until respondent has fully complied with the provisions of this order submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent intends to comply, is complying, or has complied with this order.

OPINION OF THE COMMISSION

MARCH 4, 1975

BY DIXON, *Commissioner:*

On Mar. 13, 1973, the Commission issued an opinion in the above-captioned matter, holding that Litton Industries had violated Section 7 of the Clayton Act, as amended, by its Jan. 1969 acquisition of the controlling stock interest in Triumph-Werke Wurnberg A.G. ("Triumph") and Adler-Werke A.G. ("Adler"). Litton was ordered, *inter alia*, to divest "all the stock, assets, properties, rights and privileges" of Triumph-Adler within one year of the date of the order becoming final, and not to acquire, for a period of ten years, without the Commission's prior approval, any concern engaged in the business of manufacturing typewriters.

Within a month of the Commission's opinion, on Apr. 9, 1973, Litton petitioned the Commission either to modify its order of divestiture without reconsidering the entire case, or to reconsider the full merits of the case and to enter an order dismissing the complaint. Litton, in its brief and affidavits accompanying the petition, maintained that since the position of smaller companies had deteriorated in the office and portable typewriter markets "in face of the entrenched and growing positions of IBM and SCM," divestiture was not the appropriate remedy. While six United States companies manufactured typewriters at the time of the January 1969 acquisition of Triumph-Adler, at the time of the filing of the petition there was only one, IBM, selling standard office electric typewriters, and one, SCM, manufacturing and selling portable typewriters. Litton further contended that IBM and SCM "have been able to increase their monopoly positions in the office and portable typewriter markets, respectively, because of their substantial profitability which permits them to increase their marketing effort." In addition, respondent maintained that "the evidence [of record] is overwhelming that Royal could not survive in the United States typewriter business without Triumph-Adler." This was the conclusion of the hearing examiner in the initial decision, and "events occurring since the close of the records and conditions today enforce the hearing examiner's conclusion and make it even clearer that maintaining Royal and Triumph-Adler together is necessary to promote competition in the office typewriter market in the United States."

Transmitted with the petition was a resolution of the Board of Directors of respondent's Executive Committee in which the Board resolved that it was its "judgment and conclusion * * * that the Royal Division would not be a viable competitor in the typewriter business without Triumph-Adler" and that if Litton should be required to divest Triumph-Adler "it will be necessary for Litton to dispose of the typewriter business of the Royal Division."

The National Office Machine Dealers' Association also petitioned the Commission to reconsider the divestiture order. This organization of over 900 independent office machine dealers in the United States contended that the divestiture of Triumph-Adler would force the dealers distributing Royal and Adler typewriters out of business.

Counsel supporting the complaint answered the petitions, arguing that the requests should be denied.

On May 16, 1973, the Commission ordered the reopening of the proceeding "solely for the purpose of re-examining the question of relief in its entirety." The administrative law judge, on remand, was instructed to "examine the question of appropriate relief in its entirety, and, upon completion of the hearing, [to] furnish the Commission with his findings on the issue of relief and his recommendations." Commissioner Engman did not participate in that decision, and Commissioner Jones dissented. On July 12, 1974, Administrative Law Judge Alvin L. Berman issued his "Findings on Issue of Relief and Recommendations on Remand."[1] He recommended that the ten year moratorium against acquisitions be continued, but that Litton not be required to divest Triumph-Adler.

This matter is now before the Commission on the appeal of complaint counsel from the administrative law judge's recommendation that divestiture not be required.

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[1] Referred to hereinafter as ALJR.

I

Because it is assumed that the restoration of competition in markets adversely affected by an acquisition requires a return of the acquired and acquiring firm to these markets, divestiture is ordinarily deemed "peculiarly appropriate"[2] relief when the acquisition is held to have violated Section 7 of the Clayton Act. In cases where the firms are competitors, divestiture will minimally bring about deconcentration in the adversely affected markets and may additionally serve to restore competition in the relevant markets by lowering or checking the rise of barriers to entry, decreasing the possibility of entrenchment, and reestablishing toehold firms. However, when only one of the involved firms will be restored to the relevant market, divestiture *may* not have these salutary effects, and the Commission will consider other relief.

While a proceeding on the question of relief in a Clayton Act Section 7 matter is unusual, it is not one of first impression. In *Diamond Alkali*, 72 F.T.C. 739 (1967), the Commission found that respondent's acquisition of Bessemer Limestone and Cement Company, a competitor of Diamond, eliminated a substantial competitive factor in the relevant line of commerce, *i.e.*, portland cement, and violated Section 7 of the Clayton Act. Respondent closed the cement facilities it was operating at the time of the acquisition, raising the question whether divestiture was the appropriate relief "in view of the fact that divestiture usually envisions a resultant situation wherein two firms exist where there had been one, and thus diminution of concentration, a circumstance which is not the case here* * *." *Id.* at 743.

The matter before us, of course, differs from *Diamond Alkali* in that there is a dispute in the instant matter as to whether divestiture of Triumph-Adler would result in restoration of two firms, or one, as it did in *Diamond Alkali*. The administrative law judge found that Litton-Royal would not remain in the relevant lines of commerce. Complaint counsel contend that Litton-Royal would not abandon the relevant lines of commerce. Our first task, then, is to determine which of these contentions is supported by the record.

II

To determine whether Litton-Royal would continue to manufacture and sell typewriters if required to divest Triumph-Adler requires preliminarily identification of the relevant markets, and then an analysis of what is required of firms to operate profitably, given the nature of competition, in those relevant markets.

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[2] *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, 328 (1961).

A. Relevant Markets

The Commission in its original opinion in this matter examined the competitive effect of Triumph-Adler's acquisition in the overall typewriter market and in the office typewriter and portable typewriter submarkets. The office typewriter submarket was divided further into the office electric and office manual submarkets. Although the Commission determined that self-contained automatic typewriters which perform ordinary office typing functions constituted a second major submarket, it was not utilized in analyzing the legality of the acquisition, as neither Litton-Royal nor Triumph-Adler had manufactured automatic typewriters from 1963 to 1968.

To measure market shares, the Commission considered unit sales (as witnesses testified, it was a "relevant" and "basic" system of measure), and manufacturers' suggested retail prices (because some firms sold primarily at retail, others at wholesale, and some in between), and dollar revenues. The emphasis was on the first two.

The Commission specifically rejected segmenting the office electric typewriter submarket into further "heavy duty" and "light duty" typewriter submarkets.

The administrative law judge on remand considered product markets and means of measuring these markets that varied in several instances from those utilized by the Commission in its opinion. He reasoned that markets and measures relevant for determining a violation may vary from those utilized in considering the question of the survival of Litton-Royal without Triumph-Adler. The administrative law judge said:

> In appraising the viability of Royal as well as that of other competitors in the market, it is necessary to view the market as a whole. But it is also necessary to ascertain the success and potential of competitors in the relatively important and growing segments of the market regardless of whether these segments coincide with the submarket delineations that were utilized in finding Section 7 violations. A study of sales with respect to those areas where the action is-where the dollars are to be garnered-is significant both to judge whether respondent would stay in business under particular circumstances and to evaluate the public interest in the event respondent's competition and potential competition should be lost to particular segments of the industry. ALJR 19.

Specifically, the administrative law judge segregated revenue figures for the sale of "heavy duty" office electric typewriters. These machines, which he characterized as a "segment" of the office electric typewriter market, were included since they are "the very products for which Litton claims it depends upon Triumph-Adler, the very products which it claims it must discontinue if divestiture is ordered." ALJR.

The administrative law judge also included, as a measure of the firms' position in the relevant markets, income from the lease and rental of the relevant products as "such income accounts for a large share of IBM's total revenue and its omission would distort any consideration of what is occurring in the office typewriter market." ALJR 19.

In addition, rather than emphasize unit sales and manufacturers' suggested prices, the administrative law judge gave primary consideration to actual revenues in determining the viability of competition and competitors. He reasoned that actual revenues best demonstrate the economic standing of firms in the market.

Finally, although the Commission did not consider in its original opinion the sale of reconditioned demonstrator typewriters to schools, and reconditioned used typewriters, for the reason that there was "no convincing evidence which shows that the IBM recons exercise any significant and direct influence upon the purchasing decision of prospective buyers of new office electrics,"[3] the administrative law judge thought these sales were an important source of revenue and should not be ignored when gauging the economic viability of the firms in the market.

* * * * * * *

It is important to note at this juncture that, as a general proposition, the Commission when considering the competitive consequences of divestiture will reject as irrelevant evidence relating to the effects of divestiture in markets which were not found to be relevant markets for the purpose of determining the legality of the acquisition. It is the burden of respondents, as the proponent of the proposition that relief other than divestiture is appropriate, to show by a preponderance of the evidence[4] that divestiture is unnecessary to restore competition *in the markets found to be adversely affected by the acquisition*. Since evidence relating to other, non-relevant markets can have but a tenuous connection to either anticompetitive or *de minimis* consequences of divestiture in those markets found to be affected by the acquisition, such evidence is irrelevant and inadmissible. But since the administrative law judge did not utilize "new" markets or measures for any purpose other than determining the chances of Litton-Royal's survival, we will not reject, at least on grounds of irrelevance, his findings based on these further markets and measures. In addition, it is significant that these "new" markets and measures are closely connected to those found relevant by the Commission. The "heavy duty" office electric typewriter is a segment of a market (*i.e.*, office electric typewriters) found relevant for the purposes of determining whether the Clayton Act charge was sustained. The automatic typewriter market was recognized as relevant in the Commission opinion, but, as noted above, it was not analyzed in determining legality of the acquisition, as neither Triumph-Adler nor Litton-Royal had sold automatics from 1963 to 1968. Finally, revenues which were emphasized in the remand proceeding were recognized as relevant by the Commission in its opinion, although considered relatively less important than other standards.

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[3] *Litton Industries, Inc.*, 82 F.T.C. 970, 1000 (1973).

[4] F.T.C. Rules of Practice, 3.43(a).

Before turning to an examination of the markets and other indicators that may shed light on Litton-Royal's chances of surviving without Triumph-Adler, it is necessary to consider the use of post-acquisition evidence. In remanding this matter the Commission, of course, opened the record to the admission of post-acquisition evidence on the issue of relief. Left unanswered, however, was the question of what limitations, if any, should be placed on the weight to be given such evidence. Pertinent in this regard is the Supreme Court's recent admonition concerning the utilization of post-acquisition evidence to show the anticompetitive effects of a merger: "Violators could stave off [a Clayton Act Section 7 divestiture suit] by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 504 (1974). The Court's warning is particularly apposite here as respondent, since the 1969 acquisition, has been in a position to deplete the acquired firm or some portion of its own operation, and then contend that the divestiture would not result in the restoration of two firms, and, accordingly, divestiture might not be warranted. We recognize, then, that the probative value of evidence controlled by respondent is limited, and shall give it less weight than post-acquisition evidence that respondent had no motive or capacity to manipulate.

* * * * * * *

We return to the identification of relevant markets. We agree with the administrative law judge that in testing the prospects of respondent's survival without Triumph-Adler's assets, greater weight should be given to those markets and submarkets that are likely to enjoy the most growth. After all, it is reasonable to assume that bright prospects in a declining market will not induce a reasonable businessman to commit resources to the overall market if prospects are dismal in those segments of the market that are likely to experience the most growth. The record shows that the greatest growth is likely to continue in the overall electric typewriter market and the automatic typewriter submarket, and heavy duty electric "segment" of that market. Since

1967, IBM's share of these markets has increased from what was even then an impressive share.[5] Based on market shares and excluding such considerations as potential competition and barriers to entry, IBM must be considered to be in a dominant position in these vital growth areas. In addition, none of IBM's competitors, including Litton-Royal, could be considered of sufficient market strength, based solely on their individual share of the market, to countervail the apparent competitive strength of IBM.[6]

If past unerringly foretold future, we would conclude that respondent would not do well in the important growth markets. However, the predictive value of these figures depends upon Litton-Royal's ability to overcome the obstacles that have kept it, and the other competitors of IBM, from successfully challenging IBM. We consider these obstacles next.

B. Technological Barrier

It is not disputed that the principal barrier to success in the growth typewriter markets has been, and will likely remain, technology. IBM's success in the office electric market and the automatic submarket stems in large part from its development of the electric typewriter, which is distinguishable from the products of its competitors by the single element printer. The capacity of IBM's competitors to obtain or develop a similar device is a measure of their capacity for future success in the growth markets. The administrative law judge considered Litton-Royal's prospects in this regard by examining its internal research and development capability and its capacity to obtain technology through purchase or license from IBM or other possible sources of a single element printer.

1. *The Prospects of Internal Development of a Competitive Typewriter*

We have carefully examined the record with this precise question in mind: Would it be reasonable for Litton-Royal's management, should Litton-Royal be required to divest Triumph-Adler, to attempt to create, through research and development, typewriters capable of competing with the IBM and SCM machines that have dominated the various growth markets? Litton-Royal's past efforts do not suggest an affirmative response.[7]

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[5] Market shares are based in large part on sensitive *in camera* sales figures. To convey an accurate picture of the competitive positions of the firms in the relevant markets, it is not necessary to reveal this confidential data.

[6] As to the principal nongrowth market, office manual typewriters, Litton-Royal still occupies an important position, but its share has declined substantially from 1965 to 1972, a period when industry sales fell off by close to 50 percent. In short, Litton-Royal's position has been deteriorating in a waning market. Even if respondent was to reverse the trend of declining sales of manuals, the market's prospects are so bleak that we doubt that Litton-Royal's prosperity in this market would, in the eyes of respondent's management, justify its continued presence in the overall typewriter market.

During the five years prior to the challenged acquisition, Litton-Royal's expenditures in research amounted to $13.6 million, with $3,942,000 earmarked for the development of the single element printer. The principal result of this effort was not the single element printer, however, but an office electric typewriter sold as the Royal 660, a machine that required frequent repair and failed to strengthen Litton-Royal's position in the electric typewriter market. An effort in the portable typewriter market met with similar failure. Given these failures, it is difficult to be optimistic about the capacity of Litton to develop, internally, machines capable of competing with IBM and SCM in the relevant growth markets.

Even assuming that Litton-Royal could improve on its past poor performance in research and development, the firm would require at least four years to produce a machine that would be competitive with what IBM and SCM are presently marketing. It is significant, in this connection, that SCM, whose research and development performance generally appears to have been adequate, and surely superior to that of Litton-Royal's, left the office electric typewriter market. The firm did not believe that the expenditures required to produce a machine competitive with IBM would be justified by what SCM foresaw to be the return on sales. There is nothing in the record that argues that Litton-Royal is in a more favorable position.

These considerations lead us to the same conclusion as the administrative law judge:

> Considering IBM's entrenched position of dominance and, in view of the time required, the large expenditures involved and the risk that the product developed may be unacceptable or unprofitable, it is deemed unlikely that Litton, if required to divest itself of Triumph-Adler would take the steps necessary to develop, produce and market its own standard electric and automatic office typewriters. This is particularly true with respect to electric typewriters where, except for mergers, no new entrants have appeared on the market since 1934. ALJR 54.

2. *The Prospects of Acquiring a Printer from an Outside Source*

Our review of the record to determine whether it would be reasonable to expect Litton-Royal's management, if Triumph-Adler were ordered divested, to procure from an outside source the printer needed for respondent to be competitive in the growth markets, not surprisingly shows that such a course would be marked with great uncertainty. There is no way that Litton-Royal could be assured that a supplier would maintain adequate quality controls; that shortages, strikes, or even the caprice of a supplier would not result in the discontinuance or cutback of shipments; or that changes in the monetary system would not turn a profitable arrangement into an unprofitable one. To be specific, none of the possible sources of a printer would offer to Litton-Royal a reliable source of supply. IBM, for one, will not even enter into a contract, so Litton-Royal would not be assured of a firm price or a definite supply. Olympia, which presently supplies Sperry-Rand with a single element printer, is a German firm. Since the devaluation of the dollar, its printer has become unreasonably expensive. There is also a question whether Olympia would take on another purchaser of its printer. Triumph-Adler, a potential source of supply upon divestiture, is similarly unattractive because of the uncertain foreign exchange rate.[8] The fourth possible source, Xerox, which controls the Diablo printer, is not likely to make the printer available to a potential major competitor such as Litton-Royal. Finally, and most importantly, these possible sources of the printer would be actual or potential competitors of Litton-Royal and hence unlikely to share fully new developments and to be protective of Litton-Royal in the way that a purchaser expects from a supplier before it enters into the kind of commitment that would be required here.

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[7] Royal contends that one of the principal reasons it cannot be expected to remain in the typewriter industry is that it presently has no research and development capability. However, respondent, after the acquisition of Triumph-Adler, dismantled its own research and development effort and came to rely solely upon Triumph-Adler. Because respondent was in a position to rid itself of this capability, and so manipulate the evidence; and, in addition, had a motive for doing so (*i.e.,* to make it appear that it was incapable of research and development, and thus gain support for its position that divestiture is not warranted), greater weight will be given to the pre-acquisition position of Litton-Royal in research and development.

Of course, these risks can only be compounded by the presence of IBM. The firm is deeply entrenched in the growth markets. In addition, IBM has the advantage of having had the single element printer since 1961 to refine and incorporate into its various systems.

Our reading of the record then leads us to conclude that Litton-Royal's management, acting as sound businessmen, could not be expected to acquire the single element printer from an outside source.

III. COMPETITIVE EFFECTS

Having found that respondent's divestiture of Triumph-Adler will likely result in Litton-Royal's departure from the relevant markets (*i.e.*, the overall typewriter market, the overall office typewriter market, the office electric market, the manual typewriter market, and the portable typewriter market), we turn to the question whether divestiture is necessary to restore competition in those markets found to have been adversely affected by the acquisition. Specifically, we have examined the record to determine whether the retention of the German firm would result in a lessening of competition, *and* whether its divestiture would be procompetitive. This entails consideration of how concentration, entry barriers, and entrenchment will be affected by (a) the loss of Litton-Royal, (b) the loss of Triumph-Adler as an independent, and (c) the presence of a combined Litton-Royal and Triumph-Adler. Only those markets found to be adversely affected will be considered in this connection.

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[8] As counsel supporting the complaint point out, exchange rates may well change so that it would be profitable for Litton-Royal to purchase from a foreign firm, such as Olympia or Triumph-Adler. However, what will not change is the possibility of further unfavorable fluctuations in the world money market. Foreign suppliers will always, for this reason, be less than attractive sources of the single element printer.

A. Concentration

Each of the affected markets, except that of office manual typewriters, is dominated either by IBM or SCM, while each of the other firms in the market retains a small share, whether shares are measured by revenues, units sold, or suggested retail prices. Although Litton, in each market, is second in sales, its share is small, so that it is a very distant second to the dominant firm. In addition, Litton does not possess a significantly larger share than the firms beneath it. Triumph-Adler's share is invariably one of the smallest.

We agree with the administrative law judge that the departure of Litton-Royal would not result in procompetitive deconcentration, since the marketing and other capabilities which have led IBM and SCM to gain and retain a dominant position would bring about a shift of Royal's share to them.

Further, we see no significant increase in concentration resulting from Royal's retention of Triumph-Adler, both because Triumph-Adler's share in the affected markets is so small, and because Litton-Royal's share has steadily trended downwards. These markets, in brief, will remain overall very much as they were at the time of the acquisition – dominated either by IBM or SCM, with the other firms in the industry sharing fragments of the remainder.

Equally as remote is the possibility that the removal of Triumph-Adler as an independent might result in the loss of the German firm as a possible toehold to a potential entrant, or that Triumph-Adler, through internal growth and expansion, might assume a greater share of the affected markets. On the basis of a finding that Triumph-Adler, in 1973, lost $4.50 on the sale of each heavy duty electric typewriter in the United States, while it profited by $53.21 on the sale of each such typewriter in West Germany during that year, the administrative law judge concluded that there was a "distinct possibility of a diminution of Triumph-Adler's efforts in the [electric typewriter submarket in the] United States" ALJR 72. The lack of success in this country negates the prospect of Triumph-Adler's growth by internal expansion in the relevant markets. There is insufficient record evidence that Triumph-Adler would serve as a toehold to a potential entrant.

The manual typewriter market differs from the other relevant markets in that it is not dominated by any one firm, and both Royal and Triumph-Adler rank high in terms of sales - Royal first, and Triumph-Adler fifth. Litton-Royal's or Triumph-Adler's withdrawal from the market would have unpredictable results. It is not possible to estimate with sufficient certainty whether the top firms might divide up Litton's share, thereby increasing concentration, or whether Triumph-Adler's share might be absorbed by the smaller firms. Unlike the other relevant markets, no firm is so favorably situated that we can assume it will take over Litton-Royal's share if Triumph-Adler's divestiture is required. There is no question, however, that concentration will increase significantly if the subject acquisition is allowed to stand, and that the resultant increase in concentration is presumptively a violation of Section 7 of the Clayton Act. The administrative law judge did not analyze the basis of this presumption, but, instead, weighed the presumptively anticompetitive consequences of the acquisition in the manual typewriter market as against the procompetitive effects of the retention of Triumph-Adler by Litton-Royal in the other relevant markets. This approach is unacceptable. If divestiture is necessary to restore competition in the manual typewriter market, we must require it, even though in the other markets divestiture may be contraindicated. The Commission will not be placed in the position of justifying the anti-competitive effects in one market by the pro-competitive consequences in another. The Court, in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370 (1963), rejected such an approach as "every firm in an industry could, without violating Section 7, embark on a series of mergers that would make it in the end as large as the industry leader." Hence, if the presumption stands when applied to the manual typewriter market, the divestiture will be required.

From our examination of the record, we have determined that there is evidence to rebut the "inherently anti-competitive tendency manifest by the concentration" figures. *Id.* at 366. In the manual typewriter market high concentration does not coincide with anticompetitive performance. Profits are low and sales declining. The limited number of firms in such circumstances is probably accounted for by the market's lack of promise. In the manual typewriter market, unit sales for 1965-1972 declined by almost 50 percent. Significantly, SCM discontinued the production and sale of manual typewriters, even though it at least matched the technological and marketing capabilities of the major firms in the market, and, in 1968, was the fifth ranking firm in that market. Its departure was not brought about by an inability to compete, but apparently by its lack of enthusiasm for a market where the prospects for growth and profits were dismal. The fact then that the market is concentrated stems from a lack of interest in the market by competitors and potential entrants. In addition, any entry barriers that may be present would easily be overcome by SCM and IBM. We find, then, that since the firms remaining in the manual typewriter markets are not in a position to exploit their "oligopolistic" position, the increase in concentration resulting from Litton-Royal's retention of Triumph-Adler is not competitively significant.

B. Barriers to Entry and Entrenchment

Entry by a new firm, or growth by existing firms, in the relevant markets are conditioned by their capacity to overcome technological and marketing barriers. We find nothing in the record to indicate that these barriers to entry will be affected in any way whether Triumph-Adler is divested or retained by Litton-Royal. As for possible entrenchment, the record shows that Litton-Royal will be advantaged by the retention of Triumph-Adler. This enhancement of respondent's competitive position does not, however, amount to entrenchment. At most, it means that the firm can continue as a viable competitor in the affected markets, and expand into the growth submarkets.

Finally, then, we find it unnecessary to order the divestiture of Triumph-Adler. The German firm's return to independent status will not enhance competition, nor will its retention by Litton-Royal adversely affect competition in the relevant markets. We agree, however, that the administrative law judge's recommendation that the provision requiring respondent not to acquire, for a period of ten years without the Commission's prior approval, any firm in the business of manufacturing typewriters is necessary and should stand. Litton has a history of growth through acquisition in the typewriter market, as well as in other markets. The need for a moratorium on this means of growth has been amply demonstrated.

IN THE MATTER OF

NATIONAL DYNAMICS CORPORATION, ET AL.

MODIFIED ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8803. Decision, Feb. 16, 1973 - Modified Order, Mar. 4, 1975

Order modifying previous Commission order, 82 F.T.C. 488, 38 F.R. 9157, issued against a New York City seller of battery additive, VX-6 and other products, by changing the provisions of Paragraph 1 of the order to permit respondents to represent sales, earnings, and profits in a format utilizing ranges instead of

averages. Paragraph 2 was modified to require maintenance of substantiation claims made pursuant to the requirements of Paragraph 1 as modified.

Appearances

For the Commission: *Jeffrey Tureck* and *Michael McCarey.*

For the respondents: *Solomon H. Friend*, New York, N.Y..

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

The Commission issued an order in this case on Feb. 16, 1973, from which respondents appealed to the Court of Appeals for the Second Circuit, challenging four of the six order paragraphs. The court has remanded the matter to the Commission with instructions that paragraphs 1 and 2 of the Commission's order be reformulated in accordance with the court's decision.[1]

The paragraphs in question would enjoin respondents from:

1. Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits or earnings; or representing, directly or by implication, the past or present sales, profits or earnings of purchasers of respondents' products unless in fact the past sales, or profits and earnings represented, are those of a substantial number of purchasers and accurately reflect the average sales, profits or earnings of such purchasers under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is made; or misrepresenting in any manner, the past, present or future sales, profits or earnings from the resale of respondents' products.

2. Failing to maintain accurate records which substantiate that the past or present sales, profits or earnings represented are accurate and are those of a substantial number of purchasers and accurately reflect the average sales, profits or earnings of such purchasers under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is being made.

In framing these order provisions, the Commission sought to eliminate the substantial misrepresentations of earnings figures which were found by the administrative law judge and whose existence was unchallenged before the Court of Appeals. The court concluded, however, that the Commission had reined respondents in too tightly. It expressed disapproval of the prohibition on representations of earnings figures that were not average figures, and use of the phrase "under circumstances similar to those of the purchaser* * *" which the court concluded was unduly vague. The court indicated that respondents should be able to make use of ranges of earnings in their advertisements.[2] Paragraph 2, a recordkeeping requirement, was remanded so that it could be changed to reflect whatever alterations were made in Paragraph 1.

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[1] *National Dynamics Corp.* v. *F.T.C.*, 492 F.2d 1333 (2d Cir. 1974); *cert. denied.* 419 U.S. 993 (1974). Certiorari had been sought by respondents with respect to the two paragraphs of the order which the Court of Appeals affirmed.

The Commission on remand has considered the views of respondents and complaint counsel. Both have submitted proposed drafts of a reformulated order, and have commented on each other's proposal. While we do not doubt that the submissions evidence that "good will on both sides" which the court thought would yield a solution on remand, to say that the parties remain at odds is an understatement. The Commission has sought to address the court's mandate by retaining those portions of the broad prohibitory language in Paragraph 1 of which the court did not disapprove, while adding two provisos which make clear the right of respondents under the order to use earnings ranges and testimonials under specified conditions. The Commission believes that this order addresses the court's fundamental concern, which was to allow respondents to utilize certain common approaches to the advertising of earnings, while forbidding them to use these or other techniques to perpetuate the deceptions described in the record.

Under modified Paragraph 1, use of earnings ranges may be made provided that for any stated range (*i.e.*, $5—10,000), respondents also provide an equally clear and conspicuous statement of the number of distributors who achieved earnings within that range, and a statement of the period of time over which the figures were compiled. In addition, the top figure for the highest earnings range may not exceed the highest earnings figure actually achieved by a distributor, to prevent, for example, use of a $20—40,000 category when the highest achieved figure might be only $30,000. We believe that these requirements are necessary to prevent the deceptive use of earnings ranges, without being unduly burdensome.

With respect to testimonials the Commission has taken a similar approach. Among the earnings representations found deceptive by the administrative law judge were representations of the earnings of a few exceptional individuals in a context which implied that they were typical. While the Court of Appeals did not make clear its view on the use of earnings testimonials, as opposed to earnings ranges, the Commission has endeavored to permit use of testimonials in a nondeceptive manner, in view of the court's general desire to permit truthful claims. The second proviso to Paragraph 1, therefore, permits accurate testimonials provided they are accompanied by (1) a disclosure of the amount of time per week or per month required by the testifying party to achieve the stated results; (2) a disclosure of the year or years during which, and the geographic area in which, the stated results were achieved; and (3) a disclosure of the median or average results of all participants, *or* the following statement:

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[2] The court said:

> We likewise do not see why NDC should be limited to advertising only the average sales or earnings of its distributors rather than be permitted to state ranges for various types of distributors provided it does not make deceptive use of unusual earnings realized only by a few.

The court did not address itself expressly to the question of earnings "testimonials." Respondents assert that these should be permitted; complaint counsel cite the quoted language as evidence that the court disapproved of such testimonials, and argue that to cite the experience of an atypical distributor in an advertisement is inherently deceptive. The above-quoted language can certainly be read to imply that the court felt that nondeceptive use could be made of unusual earnings realized only by a few. The Commission's modified order addresses this issue by requiring clarifying disclosures where earnings testimonials are used.

IMPORTANT NOTICE: THE RESULTS ACHIEVED BY THIS PURCHASER ARE BETTER THAN, AND NOT TYPICAL OF, THE RESULTS ACHIEVED BY THE MAJORITY OF PURCHASERS WHO PARTICIPATED DURING THE TIME PERIOD DESCRIBED.

One of these last alternative disclosures must be made *only if* the results described in the testimonial do not in fact represent the average or median results achieved by purchasers of respondents' products.

The necessity for these disclosures is readily apparent. Consumers cannot possibly assess the relevance of a testimonial to their own likely experience without knowing the amount of time per week or month devoted by the testifying party to achieving the results, or the geographic area within which such results were achieved. A statement of the year or years during which the stated results were achieved is needed to ensure that testimonials either reflect recent results or consumers are aware that they do not.

The third disclosure is designed to eliminate the likelihood that a consumer will construe the testimonial of an individual as being representative of what the average participant in the program has achieved, when such performance is not representative. Even when testimonials are not accompanied by deceptive embellishments, there is a substantial likelihood that many consumers will understand them to represent a result that the average consumer can expect to achieve. Moreover, in this case respondents sought in many ways to convey to prospective purchasers that the exceptional results of individuals were not exceptional at all, for example, by stressing the ordinariness of the individuals who had achieved the unusual results. Where the results described in testimonials are not typical, we believe that the only way that deception may be avoided is by means of disclosures which indicate the lack of representativeness. An ideal solution would be a flat requirement that where stated performance is not typical, respondents be required to state affirmatively what exactly is the typical result. Only in this way is the consumer likely to be made fully aware of the extent to which the testimonial result departs from what the majority have accomplished. In recognition, however, of the fact that detailed compilation of average or median figures for all distributors may impose a substantial burden on respondents[3], our order provides, as an alternative, that respondents may state conspicuously that the performance of a testifying party is not typical, and exceeds the average. Respondents recognize, in their own proposed order, the necessity for some indication of whether or not testimonial results are typical. We have enlarged upon this recognition simply to the extent of requiring that the lack of representativeness be disclosed clearly and forcefully, in a way that its import cannot be mitigated by the text of the testimonial.[4]

With respect to the words "circumstances similar to those of the purchaser or prospective purchaser," to which the court objected, complaint counsel note that inclusion of these words may be unnecessarily cautious inasmuch as most of respondents' distributors are part-time and any figures (mean, median, range) based on the performance of a large number of distributors would necessarily be largely results of part-time performers. In light of this the Commission has determined simply to omit the language to which the court had objected.

Paragraph 2 has been modified to require maintenance of substantiation for claims made pursuant to the requirements of Paragraph 1.

The Commission has further determined to republish those portions of its order which were appealed and affirmed by the Court of Appeals or not appealed at all. An appropriate order is appended.

ORDER MODIFYING FINAL ORDER ON REMAND

This matter is before the Commission upon remand from the United States Court of Appeals for the Second Circuit for revision of Paragraphs 1 and 2 of the order, and upon briefs submitted by counsel for respondents and complaint counsel relating to said paragraphs. The Commission has determined to modify paragraphs 1 and 2 as explained in the accompanying decision, and has further determined to republish the remainder of the order in the same form as issued, such remainder having become final. Therefore,

It is ordered, That respondents National Dynamics Corporation, a corporation, and its officers, and Elliott Meyer, individually and as an officer of such corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of the battery additive, VX-6, or of any other products, in commerce, as

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[3] In this respect earnings claims may be somewhat different from typical product performance claims, as to which information regarding average performance should be readily available to the advertiser.

[4] If respondents do not wish to maintain information allowing them to know whether or not testimonial results are typical, we think clearly the presumption must be that such results exceed the average. Respondents can avoid this disclosure by compiling and stating average or median results.

"commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits, or earnings; or misrepresenting in any manner, the past, present, or future sales, profits, or earnings from the resale of respondents' products;

Provided, That the foregoing paragraph shall not be construed to prohibit:

(a) an accurate representation of any range or ranges of sales, profits, or earnings achieved by purchasers of respondents' products which includes a clear and conspicuous disclosure (in bold-face type at least equal in size to that of the representation of the range or ranges where such appear in print) of the following information:

(i) an accurate statement of the number of participants achieving sales, profits, or earnings within the stated range; and

(ii) an accurate statement of the time period in which the reported figures were achieved.

The figure purporting to be the end figure of the highest range in an advertisement may not exceed the highest amount of sales, profits, or earnings actually achieved by a purchaser.

(b) accurate testimonials regarding the sales, profits, or earnings achieved by a purchaser of respondents' products; *Provided*, That any such testimonial includes or is accompanied by the following clear and conspicuous disclosures (in bold-face type at least equal in size to that of the principal portion of the testimonial, if printed):

(i) an accurate statement of the average amount of time per week or month required by the purchaser to achieve the stated results;

(ii) an accurate statement of the year or years during which, and the geographical areas in which, the stated results were achieved; and

(iii) if the results achieved by the purchaser providing the testimonial do not represent the average or median sales (or profits or earnings, whichever is included in the testimonial) of all purchasers of respondents' products during the time period covered by the testimonial, an accurate statement of the average or median sales (or profits or earnings) of all purchasers of respondents' products during the time period covered by the testimonial, *or* the following statement: IMPORTANT NOTICE: THE RESULTS ACHIEVED BY THIS PURCHASER ARE BETTER THAN, AND NOT TYPICAL OF, THE RESULTS ACHIEVED BY THE MAJORITY OF PURCHASERS WHO PARTICIPATED DURING THE TIME PERIOD DESCRIBED.

2. Failing to maintain records which substantiate that any past or

present sales, profits, or earnings represented are accurate. Where ranges of sales, profits, or earnings are represented, such records shall be sufficient to substantiate the number of purchasers achieving results within any stated range and the time period during which such results were achieved. Where average or median figures are represented, such records shall be sufficient to substantiate that such median or average figures are accurate. Where testimonials regarding sales, profits or earnings are employed without the statement entitled "IMPORTANT NOTICE," described in Paragraph 1(b)(iii) above, such records shall be sufficient to substantiate that the performance described in the testimonial constitutes the average or median performance for all purchasers of respondents' products during the stated time period.

3. Representing, directly or by implication, contrary to fact, that any product has been approved by any laboratory or by any other organization or person.

4. Representing, directly or by implication, in any advertisement that an independent laboratory has tested any product or that any laboratory test substantiates or supports performance claims in said advertisement, unless each performance claim in said advertisement has been substantiated by a competent scientific test conducted by said laboratory or laboratories and unless such laboratory or laboratories have supplied respondents with a written report which describes, in detail, the entire test performed, including, but not limited to, the product tested, instruments used, test procedures, data, and results of such test.

5. Using, publishing, or referring to any testimonial or endorsement unless (1) such use, publication or reference is expressly authorized in writing, and unless (2) respondents have good reason to believe that at the time of such use, publication, or reference, the person or organization named subscribes to the facts and opinions therein contained.

6. Failing to deliver a copy of this order to cease and desist to all present salesmen or other persons engaged in the sale of respondents' products, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of such order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents shall notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

THE COCA-COLA COMPANY, ET AL.

Docket 8855. Order, Mar. 4, 1975

On pre-trial discovery, subpoena *duces tecum* issued by the administrative law judge was quashed, and the production of documentary materials was directed.

Appearances

For the Commission: *Raymond L. Hays, William D. Henderson, Michael J. Bloom* and *Duncan J. Farmer.*

For the respondents: *White & Case*, New York City. *Gordon B. Spivack, Lord, Day & Lord*, New York City. *Miller, Martin, Hitching, Tipton, Lenihan & Waterhouse*, Chattanooga, Tenn. *Richard F. Atwood*, Atlanta, Ga.

ORDER QUASHING SUBPOENA *DUCES TECUM* AND DIRECTING PRODUCTION OF DOCUMENTARY MATERIALS

This matter is before the Commission pursuant to Section 3.23 of the Rules of Practice and Procedure. Through that provision the Commission may *sua sponte* review a decision by an administrative law judge to issue a subpoena requiring the production of Commission records under Section 3.36 of the Rules.

On Oct. 9, 1974, the administrative law judge issued a subpoena *duces tecum* which required that the Secretary of the Commission make available to the respondents certain internal agency documents. Although the respondents' motion requesting the subpoena was accompanied by a memorandum in support thereof, and complaint counsel submitted a brief in opposition, the administrative law judge did not append to the subpoena any explanation of his decision to grant the requested discovery or any indication of the "terms and conditions for the production of the material * * * as may appear necessary and appropriate for the protection of the public interest." 16 C.F.R. Section 3.36(c).

The issuance by an administrative law judge of a subpoena calling for internal Commission documents, without any explanation as to whether or not terms and conditions should be attached to their production and disclosure, does not in all cases indicate that the administrative law judge has failed to give appropriate consideration to the requirements of Rule 3.36. But where, as here, a wide array of documents relating to a number of different subjects is involved, and where the administrative law judge has neither ordered an *in camera* inspection of the documents nor required complaint counsel to describe their nature and content, the Commission cannot but conclude that the administrative law judge did not exercise his discretion in the matter and failed to give proper consideration to the question of whether or not terms and conditions to their production and disclosure are necessary and appropriate in the public interest.

Having concluded that the administrative law judge erred in the matter, the Commission may either determine the matter itself or remand the matter to the administrative law judge with instructions to reconsider the matter and to accompany his resulting decision with an appropriate opinion. In order to avoid further delay in the completion of pre-trial proceedings before the administrative law judge, and since the documents described by the subpoena have been compiled by the Secretary and have been inspected by the Commission *in camera*, and the parties have had the opportunity to fully brief the issues relating to disclosure and production of the documents, the Commission has determined to decide the matter itself.

The modern view of pre-trial discovery, as typified by the Federal Rules of Civil Procedure, is that all parties to a proceeding should be permitted access to whatever materials may be available for the uncovering of relevant probative evidence for use at trial. This principle applies to federal agencies as well as to private litigants. To that end, the Commission's own rules provide for a sweeping array of discovery tools, including the production of internal agency records when necessary and appropriate.

While permitting the issuance of subpoenas which call for internal documents, Rule 3.36 is, however, designed to accommodate the necessity of balancing the private litigant's right to prepare a proper defense against the government's vital interest in maintaining the integrity and efficiency of the administrative process.

The courts have traditionally honored the privilege which protects the government's decision- and policymaking processes from indiscriminate disclosure. See, *e.g., Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 946 (Ct.Cl, 1958); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (C.C. Cir. 1966), *cert. den.*, 389 U.S. 952 (1967); *Cf.*, *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 87 (1973); *United States* v. *Nixon*, 418 U.S. 683, 41 L.Ed. 2d 1039, 1064, n. 17 (1974).

> This privilege, as do all evidentiary privileges, effects an adjustment between important but competing interests. There is, on the one hand, the public concern in revelations facilitating the just resolution of legal disputes, and, on the other, occasional but compelling public needs for confidentiality. In striking the balance in favor of nondisclosure of intra-governmental advisory and deliberative communications, the privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate * * *. Nowhere is the public interest more vitally involved than in the fidelity of the sovereign's decision- and policymaking resources. *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena, supra*, 40 F.R.D. 318, 324.

While taking action to establish a policy favoring openness and to support the citizen's right to inquire into the workings of the government, the Congress nonetheless incorporated into the Freedom of Information Act an exception for those internal memoranda which comprise the crucial decisionmaking process. 5 U.S.C. Section 552(b)(5). The Commission itself has very recently indicated that the highly sensitive nature of such documents should shield them during the discovery process in the absence of "the most compelling circumstances." *Chock Full O'Nuts Corp., Inc.*, Docket No. 8884, 82 F.T.C. 747 (Order Quashing Subpoena *Duces Tecum*, Mar. 2, 1973, p. 2).

The documents described by the subpoena are listed in Appendix A to our Opinion. Certain statistical tables contained in Documents 10, 15, 19 and 23 consist of purely factual materials and are severable from the context of the documents in which they are contained. Therefore, we are directing the Secretary to produce these tables.

Specification 2 of the subpoena, broadly interpreted, would appear to specify certain portions of a copy of an electronic data processing magnetic tape, which the Commission's Bureau of Economics has rented from Economic Systems, Inc., a private firm located at 41 W. 38th St., N.Y., N.Y. This magnetic tape includes certain purely factual information of a type generally available from published sources, respecting various companies including several companies engaged in one or another facet of the soft drink industry. However, in view of the availability of this information from alternative sources, respondents and intervenors have not shown, as required by Commission Rule 3.36(b), that this information is not available from other sources by voluntary methods or pursuant to Commission Rules 3.33-3.34. Respondents and intervenors will be permitted to seek discovery of this information from the Commission in the event that efforts to obtain such materials from alternative sources on a voluntary basis are unsuccessful.

As for the remaining materials described in the subpoena, the

Commission has concluded that all of them are of an advisory or deliberative nature and are privileged in that their disclosure "would be injurious to the consultative functions [of the Commission and its staff] which the privilege of nondisclosure protects." *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 87 (1973), quoting from *Kaiser Aluminum & Chemical Corp.* v. *United States, supra*, 157 F. Supp. at 946.

While these privileged documents are of such a nature that disclosure might be authorized if circumstances of the most compelling nature were presented, respondents and intervenors have not demonstrated that any such circumstances exist in this case, nor are such circumstances apparent on the basis of the record presently before the Commission.

The order we enter today will not preclude respondents and intervenors from again applying for discovery of these documents and attempting to demonstrate before the administrative law judge that, notwithstanding the privileged nature of the documents, circumstances of the most compelling nature exist to warrant their production. If respondents and intervenors do so, the administrative law judge should make appropriate findings on this point in disposing of the application for discovery. To the extent that any such application is granted, the Administrative Law Judge should explain what, if any, terms and conditions for the production of the material are necessary and appropriate for the protection of the public interest. Accordingly,

It is ordered, That the subpoena *duces tecum* be, and it hereby is, quashed without prejudice. However, the Secretary of the Commission is directed to produce and disclose to respondents and intervenors copies of the statistical tables appearing at the particular pages indicated in the following described documents: (1) pages 2-6 of a memorandum from Edward Manfield to Michael Glassman, Chief, Division of Economic Evidence, dated Nov. 30, 1972, entitled "Soft Drink Industry" (identified in Appendix A hereto as Document No. 10); (2) pages 3-5, 7, 13 and 15 of an undated attachment entitled "Proposal for the Study of the Soft Drink Industry" to a memorandum from H. Michael Mann, Director, Bureau of Economics, to the Commission, dated Feb. 4, 1972, entitled "Study of Soft Drink Industry" (Document No. 15); (3) pages 3-5, 7-8, and 12 of a memorandum from the Bureau of Economics to the Commission, dated Oct. 18, 1973, entitled "Recommendation: That an Investigation be Initiated in the Soft Drink Industry" (Document No. 19); and p. 6 of a 6-page attachment entitled "Proposal for a Study of the Soft Drink Industry" to a memorandum from Robert Larner, Chief, Division of Industry Analysis, and James Dalton, to H. Michael Mann, Director, Bureau of Economics, dated Oct.

18, 1971, entitled "Priority Rating of Soft Drink Study" (Document No. 23). The Secretary is further directed to excise all textual materials which appear on the aforementioned pages before producing them to respondents and intervenors.

APPENDIX A

Documents Described in Specifications of Subpoena Duces Tecum

1. A memorandum to the Commission from Division of General Trade Restraints dated June 18, 1969, entitled "Budget Plan and Program for Fiscal 1971-Response to Commissioner Jones' memorandum of May 27, 1969."

2. Two tables from a compilation of tables entitled "OPPE Antitrust Benchmark Data System for Key Competitive Characteristics: Volume 1. Agriculture, Construction, Mining and Manufacturing," as follows: (a) "Profile of Competitive Characteristics, SIC 2087, Flavoring Extracts and Sirups NEC" and "Profile of Competitive Characteristics, SIC 2086, Bottled and Soft Drinks."

3. A memorandum to the Commission from Bureau of Economics dated Jan. 25, 1972, entitled "Allocation of Commission Antitrust Resources-in Response to Commission Minute of September 15, 1971, Regarding Policy Planning Program," consisting of 3 pages.

4. A memorandum from William F. Long, staff economist, Bureau of Economics, dated Jan. 25, 1972, entitled "Allocation of Commission Antitrust Resources," a 42-page document.

5. A memorandum to the Commission from H. Michael Mann, Director, Bureau of Economics, dated Apr. 4, 1972, entitled "Allocation of Commission Antitrust Resources Regarding Policy Planning Program-Response to Commission Minute of Sept. 15, 1971," a one-page document attaching "Appendix A" to the Bureau of Economics' memorandum of Jan. 25, 1972. "Appendix A" is a 15-page econometric model consisting of a series of algebraic formulations, purporting to be a highly technical demonstration of the proofs necessary to sustain many of the documents contained in that memorandum.

6. A memorandum from William F. Long, Bureau of Economics, and Edward J. Heiden, Office of Policy Planning and Evaluation, dated Mar. 30, 1972, entitled "Pilot Project to Illustrate a Policy Planning Model for the Bureau of Competition-in Response to the Minute of Feb. 8, 1972." This is a 34-page document which presents a "provisional" model of a decisionmaking framework for the allocation of the Commission's antitrust resources and incorporating the "monopoly loss calculations" developed in the Bureau of Economics' memorandum of Jan. 25, 1972 (Item 4 above), information on competitive characteristics from the OPPE benchmark data system, and estimates of the probability of enforcement success from the Bureau of Competition.

7. Tables for Long/Heiden memorandum of Mar. 31, 1972, consisting of 13 tables amounting to a total of 30 pages, summarizing, industry by industry, the quantitative data developed in the referenced memorandum (Item 6 above).

8. A memorandum to the Commission from the Bureau of Economics and Office of Policy Planning and Evaluation dated Mar. 30, 1972, entitled "Prototype Resource Allocation Model for two Antitrust Activities: Shared Monopoly and Horizontal Mergers," a 6-page response to a Commission Minute of Feb. 8, 1972.

9. A one-page memorandum to the Commission from William F. Long, Bureau of Economics, dated May 10, 1972, entitled "Errata for BE/OPPE memorandum of Mar. 30, 1972," and attached revised Table 13.

10. A memorandum from Edward Manfield to Michael Glassman, Chief, Division of

Economic Evidence, dated Nov. 30, 1972, entitled "Soft Drink Industry", summarizing the author's views concerning market structural trends in the industry.

11. A memorandum from Edward Manfield to Staff, dated July 12, 1973, entitled "A Theory of Shared Monopoly," consisting of 5 pages.

12. A memorandum from Mr. Manfield to Mr. Glassman, dated Oct. 26, 1972, entitled "Preliminary Thoughts on Franchising" (12 pages).

13. A memorandum from Mr. Manfield to Mr. Glassman, dated Mar. 2, 1973, entitled "Barriers to Entry," consisting of 20 pages.

14. A memorandum from James Dalton and Robert Larner to H. Michael Mann, Director, Bureau of Economics, dated Oct. 7, 1971, entitled "Data Requirements and Availability for the Proposed Soft Drink Study," consisting of 2 pages.

15. A memorandum from H. Michael Mann, Director, Bureau of Economics, to the Commission, dated Feb. 4, 1972, entitled "Study of Soft Drink Industry-Response to Commission Minute of Sept. 17, 1971," consisting of 20 pages.

16. A one-page memorandum marked "CONFIDENTIAL," from Robert Larner, Chief, Division of Industry Analysis, Brueau of Economics, to John Ferguson, Assistant General Counsel, dated Sept. 23, 1971, attaching a first draft study of the soft drink industry.

17. A memorandum from Messrs. Dalton and Larner of the Bureau of Economics, to Messrs. Bob Lee and Dave Wilson, attorneys, dated Dec. 8, 1971, entitled "Justification for Request From Soft Drink Companies," consisting of 3 pages.

18. A memorandum from Robert Larner, Chief, Division of Industry Analysis, and Mr. Dalton to H. Michael Mann, Director, Bureau of Economics, dated Oct. 18, 1971, entitled "Priority Rating of Soft Drink Study," consisting of 2 pages.

19. A memorandum from the Bureau of Economics to the Commission, dated Oct. 18, 1973, entitled "Recommendation: that an investigation be initiated in the soft drink industry," consisting of 17 pages.

20. A memorandum from the Bureau of Economics to the Commission dated Mar. 1, 1972, entitled "Study of Soft Drink Industry-Response to Commission Minute of Feb. 22, 1972," consisting of 5 pages.

21. A memorandum from James W. Meehan, Jr., Assistant to the Director of the Bureau of Economics, to Commissioner Mary Gardiner Jones, dated May 25, 1972, entitled "Study of the Soft Drink Industry," consisting of 7 pages.

22. A memorandum from James Dalton to H. Michael Mann, *et al.*, dated Feb. 16, 1972, entitled "Commissioner Jones' Memorandum of Feb. 15, 1972," consisting of 2 pages.

23. A memorandum from Robert Larner, Chief, Division of Industry Analysis, to H. Michael Mann, Director, Bureau of Economics, dated Oct. 18, 1971, entitled "Priority Rating of Soft Drink Study" (same as #18 above), with appended materials as follows: pages 2 through 22 of Item #18 above; an undated 6-page document entitled "Proposal for Study of the Soft Drink Industry"; four numbered undated pages beginning "What the Study Will Do"; and another copy of the Larner and Dalton memorandum included as an attachment to Item #15 above.

IN THE MATTER OF

EXXON CORPORATION, ET AL.*

Docket 8934. Order, Mar., 4, 1975

Denial of complaint counsel's motion for (1) major integrated procedural relief relative to discovery, (2) manual for complex litigation, (3) a second administrative law judge, and (4) a firm schedule for prehearing phase of the case. Also denial of respondents' suggestions for dismissal of the complaint.

ORDER DENYING MOTION FOR MAJOR INTEGRATED PROCEDURAL RELIEF

By order of Oct. 23, 1974, the administrative law judge certified to the Commission complaint counsel's "Motion for Major Integrated Procedural Relief" requesting (1) with respect to this matter, substitution with minor modifications of the discovery rules of the Federal Rules of Civil Procedure for the Commission's discovery rules or, in the alternative, liberalization of the latter to facilitate the taking of depositions; (2) adoption of the Manual for Complex Litigation as a guide for this matter; (3) appointment of a second administrative law judge to rule upon all discovery related matters in this proceeding; and (4) adoption of a firm schedule for the prehearing phase of this case. In a joint answer, all respondents except Texaco oppose this motion in all respects. For its part, Texaco also opposes the motion and suggests that this matter be withdrawn from adjudication for further investigation. Finally, in a separate pleading, respondent, Shell Oil Company proposes that this complaint be dismissed and that the Commission confine its future activities in the field of energy to the gathering and analysis of data.

Upon consideration of the voluminous pleadings filed in connection with this matter, the Commission has determined to deny complaint counsel's motion in all respects. As for request (1), as a general principle the Commission does not favor tailoring special rules for individual cases. Complaint counsel have not convinced us that we should depart from this general principle. Furthermore, the Commission presently has under consideration a number of proposed rule changes including revisions of the Commission's discovery rules for adjudicative proceedings. The revisions dealing with discovery rules will be published in the near future in the *Federal Register* as proposals, and public comment will be invited as well as the views of the Commission's operating bureaus and administrative law judges. Respondents in this and any other pending adjudicative matters which may be affected by any such rule changes may, of course, also submit their views at that time.

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* For appearances see p. 91 herein.

Requests for the adoption of the "Manual for Complex Litigation" as a guide in this proceeding and a firm prehearing schedule and trial-commencement date are also denied. Although the Commission encourages consideration by the administrative law judge of many of the procedural devices included in the Manual, wholesale "adoption" of the Manual by Commission directive is unnecessary and unwarranted. These procedural devices and the question of prehearing schedules are best left to the administrative law judge to rule upon.[1] The question of the need for an additional administrative law judge is one that should be directed in the first instance to the chief administrative law judge who has authority to appoint an additional law judge or judges if he determines there is compelling need for them.

Finally, the Commission concludes that it would be contrary to the public interest to adopt respondents' suggestions that the complaint herein be dismissed and to the extent that such suggestions were intended to be motions, they are denied.

It is so ordered.

IN THE MATTER OF

SOUNDTRACK CHEVELL INDUSTRIES, INC., ET AL.

Docket 8998. Order, March 4, 1975

Complaint counsel ordered to show cause, within ten days, why complaint should not be dismissed as to individual respondent Tommie Tubb.

Appearances

For the Commission: *Richard H. Gately, Paul W. Turley* and *John Hemrick.*

For the respondents: *Pro se.*

DISSENTING STATEMENT OF COMMISSIONERS M. ELIZABETH HANFORD AND STEPHEN NYE

We dissent from the Commission's decision to require complaint counsel to show cause why this complaint should not be dismissed as to respondent Tommie Tubb.

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[1] In certifying this matter to the Commission, the ALJ recognized his authority to adopt the "Manual for Complex Litigation" as a guide and, of course, fix a prehearing schedule and date for commencement of trial. However, in view of his lack of authority to grant the other relief requested, he certified all of complaint counsel's requests as they were "so closely related as to warrant certification of the motion as an 'integrated package.'" Order of Certification, Oct. 27, 1974.

In *American Chinchilla Corporation, Inc., et al.*, 76 F.T.C. 1016 (1969), the Commission established that it would not countenance entry of an order against an indigent respondent unrepresented by counsel. To guard against a recurrence of the *American Chinchilla* situation, the Commission on Dec. 15, 1970 issued a policy statement setting forth carefully designed procedures for the appointment of counsel for indigent respondents.[1] Thereafter, thanks to the gracious cooperation of the Antitrust Section of the American Bar Association, those procedures have been used to good effect on several occasions. We see no reason why the same procedures should not be followed[2] in this matter.

Indeed, the established procedures have been followed, to a degree. On or about Jan. 10, 1975, Mr. Tubb filed the prescribed "Statement of Financial Status," together with certain documents in support of his application for appointment of counsel. At that point, the appropriate procedure would have been for the administrative law judge to make findings on Mr. Tubb's financial ability to retain counsel, and forward those findings to the Commission.[3] On Feb. 4, however, the administrative law judge certified the question to the Commission, without having made such findings.

Because the majority provides no explanation for its departure from the 1970 policy statement, widespread confusion is likely to ensue. When it issued its complaint in this matter, the Commission ascertained that the public interest would be served thereby. We see no information which casts doubt on that determination, nor is there any occasion to reexamine it at this juncture. All we have learned is that Mr. Tubb may be in financial difficulty at the present time. Unless we are to conclude that indigence as of the time of trial is a defense to a Section 5 charge, we ought not to disturb our determination to include Mr. Tubb in this complaint. We believe the proper course for us now is to return the matter to the law judge to permit him to make findings pertinent to the respondent's financial ability to hire a lawyer.

CONCURRING OPINION OF COMMISSIONER THOMPSON

BY THOMPSON, *Commissioner:*

Having no desire to play the role of Hugo's relentless detective Javert and pursue some latter day Jean Valjean across a decade or so of troubles for stealing a loaf of bread-or at least for being on the scene when one was stolen-I support this show cause order. The "villain" we are now pursuing, a former salesman for these respondents, is now, according to his affidavits, a $150 a week handyman with no significant assets and hence unable to employ counsel. If he played a substantial role in these alleged deceptions, then I might be prepared to see him brought in with Jean Valjean. If not, I would free them both from the galleys and let the Federal Trade Commission get on with the serious business of trying to help the country's economy.

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[1] Statement of Policy: Respondents Unable to Afford Counsel, 35 Fed. Reg. 18998 (Dec. 15, 1970).

[2] *See, e.g., Universe Chemicals, Inc., et al.*, 77 F.T.C. 163 (interlocutory order, 1970).

[3] Such findings have been made in other cases. *See, e.g., Steven Rizzi, et al.*, dba *Freight Liquidators*, Dkt. 8937 (Findings on the Financial Inability of Sam Katz to Retain Counsel, Sept. 28, 1973).

ORDER TO SHOW CAUSE WHY COMPLAINT SHOULD NOT BE DISMISSED AS TO RESPONDENT TUBB

By order of Feb. 6, 1975, the administrative law judge has certified to the Commission the request of respondent Tommie Tubb that the Commission appoint counsel to represent him in this matter. Having considered this request, including Mr. Tubb's present employment and financial situation, the Commission believes that it would be in the public interest to consider further the question of whether this individual respondent is a necessary party to this proceeding. Accordingly,

It is ordered, That complaint counsel be, and they hereby are, ordered to show cause, within ten (10) days of this order, why this complaint should not be dismissed as to respondent Tubb.

Commissioners Hanford and Nye dissenting.

IN THE MATTER OF

BESTLINE CORPORATION, ET AL.

MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-1986. Decision, July 22, 1971 - Modified Order, Mar. 4, 1975**

Order modifying an earlier order dated July 22, 1971, 79 F.T.C. 107, 36 F.R. 17982, issued against a San Jose, Calif., seller and distributor of household, commercial, and industrial cleaners and waxes, and distributorships therefor, by expanding the order, as to corporate respondents only, to include a more precise definition and clarification of "multi-level marketing programs."

Appearances

For the Commission: *W. J. Marschalk* and *Robert Galler*.

For the respondents: *Robert N. Humphries, Humphries, Berger,*

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* Reported as corrected by order of Apr. 22, 1975.

Pitto & Pearl, San Jose, Calif., *Joseph N. Cotchett, Hutchinson & Dyer*, San Mateo, Calif.

ORDER REOPENING PROCEEDINGS AND MODIFYING ORDER TO CEASE AND DESIST

Respondents Bestline Corporation (incorrectly identified earlier as Bestline Products Corporation) and Bestline Products, Inc., filed a petition on Dec. 6, 1974, requesting that this matter be reopened and the cease and desist order of July 22, 1971, be modified. Following negotiations with the Commission's staff attorneys, respondents filed a supplement to this petition, one that, with a slight further modification, is not opposed by Commission counsel.

Section 3.72(b) of the Commission's Rules of Practice permits a reopening of a final order of this agency only upon a showing of changed conditions of law or fact or that such reopening and modification are otherwise required by the public interest. In the instant matter, these tests are said to be satisfied in that (a) the order in question is uncertain in scope because of a failure to define a key phrase, "multilevel marketing program," and that (b) this infirmity is illustrated by the fact that subsequent Commission orders, *e.g.*, *Ger-Ro-Mar, Inc., et al.*, Docket No. 8872 (Oct. 15, 1974) [84 F.T.C. 95] and *Holiday Magic, Inc., et al.*, Docket No. 8834 (Oct. 15, 1974) [84 F.T.C. 748] employ a substantially different terminology of more precise and different scope. While inconsistencies between consent orders are generally attributable to factual differences between cases and the give-and-take of negotiation rather than order deficiencies that require reopening and clarification, we are persuaded that the public interest requires a modification in the instant case.

The petition before us having been filed only on behalf of the corporate respondents, and a civil penalty action involving an alleged violation of the order by one of the individual respondents being in progress before the United States District Court for the Northern District of California, we will defer any modification of the order in regard to said individuals until such time as an appropriate application therefor might be duly filed. Accordingly,

It is ordered, That the proceedings in the above-captioned matter be, and they hereby are, reopened.

It is further ordered, That the Commission's order in said matter, issued July 22, 1971 [79 F.T.C. 107], be, and it hereby is, modified to read as follows:

ORDER

PART I

It is ordered, That respondents William E. Bailey and Robert W. DePew individually and as officers of Bestline Corporation and Bestline Products, Inc., directly or through any corporate or other device in connection with the advertising, offering for sale, sale or distribution of household, industrial or commercial cleaners or waxes or other products or of distributorships or franchises in a multi-level or other marketing program or with the seeking to induce or inducing the participation of persons, firms, or corporations in a multi-level or other marketing program in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Operating or, directly or indirectly, participating in the operation of any multi-level marketing program wherein the financial gains to the participants are dependent upon the continued, successive recruitment of other participants.

2. Offering to pay, paying or authorizing the payment of any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other consideration to any participants in respondent's multi-level marketing program for the solicitation or recruitment of other participants therein.

3. Offering to pay, paying or authorizing payment of any bonus, override, commission, cross-commission, discount, rebate, dividend or other consideration to any person, firm or corporation in connection with the sale of any product or service under respondent's multi-level marketing program unless such person, firm or corporation performs a bona fide and essential supervisory, distributive, selling or soliciting function in the sale and delivery of such products to the ultimate consumer.

4. Requiring prospective participants or participants in respondents' said program to purchase the product or pay any other consideration, other than payment for the actual cost of necessary sales materials, in order to participate in any manner therein; *Provided, however*, That respondents may require or may suggest the purchase of specific and reasonable inventories only, by any distributor, on the express condition that respondents at the same time agree to repurchase any unused and undamaged portion of an initial inventory from any purchaser thereof at full cost less reasonable shipping costs, if any, within 90 days from the delivery of the product at the option of the purchaser; *Provided further, however*, That if inventory costs reach $500 or more, within said 90 day period, then said obligation to

repurchase shall cease immediately upon participant's tendering a subsequent order to purchase the product.

5. Using any multi-level marketing program, either directly or indirectly:

(a) Wherein any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other compensation or profit inuring to participants therein is dependent on the element of chance dominating over the skill or judgment of the participants; or

(b) Wherein no amount of judgment or skill exercised by the participants has any appreciable effect upon any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other compensation or profits which the participants may receive; or

(c) Wherein the participant is without that degree of control over the operation of such plan as to enable him substantially to affect the amount of any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other compensation or profit which he may receive or be entitled to receive.

6. Using any multi-level marketing program which fails to:

(a) Inform orally all participants in respondents' multi-level marketing programs and to provide in writing in all contracts of participation that the contract may be cancelled for any reason by notification to respondents in writing within three working days from the date of execution of such contract.

(b) Refund immediately all monies to (1) participants who have requested contract cancellation in writing within three working days from the execution thereof, and (2) participants showing that respondents' contract solicitations or performance were attended by or involved violation of any of the provisions of this order.

7. Representing, directly or by implication, that participants in respondents' multi-level marketing programs will earn or receive any stated or gross or net amount; or representing, in any manner, the past earnings of participants unless in fact the past earnings represented are those of a substantial number of participants in the community or geographical area in which such representations are made and accurately reflect the average earnings of these participants under circumstances similar to those of the participant or prospective participant to whom the representation is made.

8. Representing, directly or by implication, that it is not difficult for participants to recruit or retain persons to invest in respondents' multi-level marketing programs as distributors or as sales personnel to work home routes or sell respondents' products door-to-door or any other manner.

9. Representing, directly or by implication, that it is not difficult for

participants to ascend to a higher level of distribution within the marketing chain.

10. Representing, directly or by implication, that all participants in the respondents' multi-level marketing program or any other sales program will succeed.

11. Representing, directly or by implication, that the supply of available entrants or investors in the respondents' marketing program is inexhaustible; or misrepresenting, in any manner, the availability of such entrants or investors.

12. (a) Failing to disclose, orally and in writing, the terms of this order to cease and desist to all present and future distributors, salesmen or other persons engaged in the sale of respondents' products, services, or merchandising programs, and securing from each such distributor, salesman or other person a signed statement evidencing receipt of said disclosure.

(b) Failing to make available on request a copy of this cease and desist order to any participant or prospective participant.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

PART II

It is further ordered, That respondents Bestline Products, Inc. and Bestline Corporation, corporations, their officers, agents, representatives and employees, directly or indirectly, or through any corporate or other device in connection with the advertising, offering for sale, or sale of products, services, franchises or distributorships, or in connection with seeking to induce or inducing the participation of persons, firms or corporations therefor, or in connection with any marketing program or any other kind of merchandising, marketing or sales promotion program in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Operating or directly or indirectly participating in the operation of any marketing or sales program wherein the financial gains to the participants are dependent upon the continued, successive recruitment of other participants; *Provided, however*, That financial gains offered or received in accordance with paragraph 3 hereinbelow shall not be prohibited by this paragraph.

2. Offering to pay, paying, or authorizing the payment of any finder's fee, bonus, override, commission, cross-commission, discount, rebate, dividend or any other form of consideration to any participant

or prospective participant for the solicitation or recruitment of any other participant or participants in any marketing or sales program.

3. Offering to pay, paying, or authorizing payment of any bonus, override, commission, cross-commission, discount, rebate, dividend or any other form of consideration to any person, firm or corporation in connection with the sale of any product or service unless such person, firm or corporation performs a bona fide and essential supervisory, distributive, selling or soliciting function in the sale and delivery of products or services to the ultimate consumer.

4. Requiring prospective participants or participants, in order to participate in any manner in respondents' marketing or sales program, to purchase products or pay any other consideration other than the actual costs to respondents, as determined by generally accepted accounting principles, of reasonably necessary sales materials and training relating to the sale of products or services; *Provided, however*, That respondents may suggest, but not require, that participants or prospective participants purchase specific amounts of product inventory; *Provided*, That such suggested purchases shall not exceed the reasonably necessary inventory requirements of participants of the same level of distribution and status for a period not to exceed one (1) month, based on the actual monthly purchasing experience of at least fifteen percent (15 percent) of the participants who have been engaged in respondents' program at such level and status for at least six (6) months and who have purchased products or services, either directly or indirectly, from respondents within the past six (6) months.

5. Failing to repurchase any unused and undamaged products which were purchased directly or indirectly from respondents by a participant within eighteen (18) months before the voluntary or involuntary termination of such participant at not less than 95 percent of the net cost of such products to such participant upon the return of such products to respondents or their designated nominee for such purpose, freight prepaid.

6. Failing, clearly and conspicuously, to disclose on each product or services order form and other documents utilized by participants or prospective participants to acquire products or services either directly or indirectly from respondents the following: Distributors are not required to purchase any specific amount of products. (*Name of applicable business organization*) guarantees the repurchase, at 95 percent of net cost, of all unused and undamaged products purchased within 18 months before a distributor's termination and returned freight prepaid.

7. Using any marketing or sales program which fails to:

(a) Inform orally all new participants in such program and to provide in writing in all contracts of participation relating thereto that the contract may be cancelled for any reasons by notification to respondents or to their sponsoring distributor, in writing, within three (3) working days from the date of execution of such contract.

(b) Refund immediately all monies to (1) participants who have requested contract cancellation in writing within three (3) working days from the execution thereof, and (2) participants showing that respondents' contract solicitation or performance were attended by or involved violation of any of the provisions of this order.

8. Representing, directly or by implication, or by use of hypothetical examples that participants in any marketing program, or any other kind of merchandising, marketing or sales promotion program, will earn or receive, or have the potential or reasonable expectancy of earning or receiving, any stated or gross or net amount, or representing in any manner the past earnings of participants, unless in fact the earnings represented are those of a substantial number of participants in the community or geographic area in which such representations are made, and the representation clearly indicates the amount of time required by said past participants to achieve the earnings represented, and failing to maintain adequate records which disclose the facts upon which any claims of the type discussed in this paragraph are based, and from which the validity of any claim of the type in this paragraph can be determined.

9. Representing, directly or by implication, that it is not difficult for participants to recruit or retain persons to invest in respondents' marketing or sales programs as distributors or as sales personnel to work home routes or sell respondents' products door-to-door or any other manner.

10. Representing, directly or by implication, that it is not difficult for participants to ascend to a higher level of distribution within the marketing chain.

11. Representing, directly or by implication, that all participants in respondents' marketing or sales programs will succeed.

12. Representing, directly or by implication, that the supply of available entrants or investors in the respondents' marketing program is inexhaustible; or misrepresenting, in any manner, the availability of such entrants or investors.

13. (a) Failing to disclose, in writing, the existence of this order to cease and desist and its terms to all present and future distributors, salesmen or other persons engaged in the sale of respondents' products, services or merchandising programs by mailing to the last known address of each present distributor such written disclosures and by securing from each distributor, salesman or other person who becomes

a participant in respondents' marketing or sales program subsequent to the effective date of this order a signed statement evidencing receipt of such disclosure. ("Present distributors" as used herein shall mean those distributors who have purchased products, directly or indirectly, from respondents within eighteen (18) months of the effective date of this order.)

(b) Failing to make available on request a copy of this cease and desist order to any participant or prospective participant.

It is further ordered, That for 120 days subsequent to the effective date of this order or until the existing order forms presently utilized by respondents are exhausted, whichever occurs first, it shall be sufficient to show compliance with Part II, paragraph 6 of this order, to show that each order form which respondents disseminate subsequent to the effective date of this order has attached to it or stamped thereon the disclosure required by said paragraph 6.

It is further ordered, That the corporate respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the respondent corporations shall forthwith, distribute a copy of this order to each of their operating divisions.

It is further ordered, That the corporate respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

FLEETWOOD ENTERPRISES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2641 Complaint, Mar. 4, 1975 - Decision, Mar. 4, 1975

Consent order requiring a Riverside, Calif., manufacturer of mobile homes, among other things to cease unfair and deceptive warranty practices through the establishment of a prompt and effective system to handle warranty-related problems. The order requires respondent to provide warranty repairs or services on still-unrepaired mobile homes manufactured between 1972 and 1974 and to provide future retail purchasers with relief by establishing and

maintaining a regular and effective system to handle complaints and service. Under this system, all repairs must be complete within thirty days after notification to the respondent of defects. Where the defects affect safety or habitability of the mobile home, the repairs must be started within three business days and be expeditiously completed.

Appearances

For the Commission: *Eric M. Rubin, Robert N. Weinstock, Walter E. Diercks* and *Pamela B. Stuart.*

For the respondents: *William H. Lear,* Riverside, Calif., and *Donald Belcher, Gibson, Dunn & Crutcher,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Fleetwood Enterprises, Inc., a corporation, and certain of its subsidiaries, (hereinafter referred to as respondents) have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint and the order attached hereto the term "mobile home" means a movable or portable dwelling over thirty two feet in body length and over eight feet in width, constructed to be towed on its own chassis and designed so as to be installed with or without a permanent foundation for human occupancy as a residence, which may include one or more components which can be retracted for towing purposes and subsequently expanded for additional capacity, or two or more units separately towable but designed to be joined into one integral unit. "Mobile home" as used herein includes the mobile home structure, including the plumbing, heating and electrical systems.

PAR. 2. Respondent Fleetwood Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 3125 Myers St., P.O. Box 7638, Riverside, Calif.

PAR. 3. Respondents are now and have been engaged in the design, manufacture, advertising, offering for sale, sale and distribution of mobile homes to selected mobile home dealers. Manufacturing is accomplished in approximately 32 facilities controlled and operated by respondents, located in approximately 18 states. Respondent Fleetwood Enterprises dominates, controls, condones, approves and derives pecuniary benefit from the conduct of its subsidiaries engaged along with it in the above described business.

PAR. 4. In the further course and conduct of their aforesaid business respondents are now and have been soliciting persons (individuals, partnerships and corporations) to become "authorized" dealers, and are also solicited by persons who desire to become "authorized" dealers. Respondents select certain of these persons as "authorized" dealers. In the normal course of business respondents sell and distribute the aforesaid homes only to these "authorized" dealers who then resell these products to the public. In the normal course of business the way in which the aforesaid homes are purchased new at retail unused by a first purchaser is through an "authorized" dealer.

PAR. 5. In the further course and conduct of their aforesaid business respondents place primary reliance on their "authorized" dealers to ascertain which of their aforesaid mobile homes contain defects which are subject to the aforesaid warranty, and to notify respondents of defects for which respondents assume responsibility. Respondents also place primary reliance on their "authorized" dealers to effect such repairs and services as are necessary to correct defects covered by the aforesaid warranty and to notify respondents of those defects covered by the aforesaid warranty which said dealers are unable or unwilling to fully correct, so that respondents may repair the aforesaid defects either directly with their own personnel or through the use of an independent service contractor.

PAR. 6. In the further course and conduct of their aforesaid business, respondents now cause and have caused, their mobile homes to be transported to "authorized" dealers located in various States of the United States and to be sold to retail purchasers by such dealers. Respondents therefore maintain and have maintained a substantial course of trade in said mobile homes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. In the further course and conduct of their aforesaid business respondents are now, and have been, orally or in writing, directly or through their dealers and others, granting or disseminating certain warranties or certain statements concerning their warranties to each retail purchaser of their aforesaid mobile homes by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act.

(a) Each written warranty disseminated by respondents since approximately Oct. 1972 represents directly or by implication that respondents warrant their mobile homes to be free from any substantial manufacturing defects in material or workmanship and that respondents shall for all purchasers or their transferees repair or replace any parts which respondents determine to be defective, or take other appropriate action at the site of the unit for one year after the delivery of the unit to the purchaser. Each written warranty disseminated by respondents prior to approximately Oct. 1972, and for some time previous, represented directly or by implication that respondents' mobile homes were guaranteed to the original purchaser to be free from manufacturing defects in materials and workmanship, except for certain specific components therein enumerated as not being warranted by respondents at all, including but not limited to appliances and furniture.

Both of the aforesaid written warranties further purport to disclaim all other warranty rights which are imposed by force of law, including but not limited to the implied warranties of merchantability and fitness for a particular purpose, and represent directly or by implication that the aforesaid written warranties set forth the full extent of respondents' warranty obligations.

PAR. 8. In the further course and conduct of their aforesaid business respondents have engaged in acts and practices which result in, and have resulted in, the failure to maintain an adequate, regular and effective system which assures that every retail purchaser of respondents' mobile homes in fact receives full service and repair of defects covered by the aforesaid warranty within a reasonable time.

Typical, but not inclusive of such acts and practices, are:

(a) The dissemination of a written warranty as described in Paragraph Seven which fails to disclose the true nature and extent of purchasers' warranty rights and those warranty obligations which respondents in fact undertake in the normal course of business, including but not limited to:

(1) The fact that pursuant to respondents' policies it is regarded as the "authorized" dealers' sole and complete responsibility, at least in the first instance, to perform repairs and service for certain classes of defects covered by the aforesaid warranty without compensation or reimbursement by respondents and without regular and effective action by respondents to determine whether such repairs and service are in fact fully performed within a reasonable time.

(2) The representations, made directly or by implication, that the aforesaid warranties are the sole legal warranties, that they legally exclude and disclaim all implied-in-law warranties, and that said warranties state the sole legal remedy available to the purchaser, when in truth and in fact under the applicable law of several states in which respondents' homes are sold at retail such exclusions, disclaimers or limitations are unenforceable.

(3) The representation, made directly or by implication, that as a

condition precedent to securing full performance by respondents of their warranty obligations every party to whom the warranty is offered must complete properly and mail to respondents a certain Warranty Card at the time he or she purchases said mobile home, when in truth and in fact respondents' internal policy is to provide such performance irrespective of whether the card has been returned.

(b) The failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four are competent to perform warranty service or have made adequate arrangements for performing warranty service through independent contractors.

(c) The failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, notify respondents of the existence of claims initiated by retail purchasers for warranty service or for repair of defects covered by the aforesaid warranty.

(d) The failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, in fact fully perform and complete within a reasonable time all warranty service and repairs performed on behalf of respondents.

(e) The failure to establish and maintain an effective and regular mechanism for the prompt and fair resolution of mobile home consumer complaints and requests for service and repairs relating to respondents' warranty or warranty policies.

(f) The failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four, either directly or by action through independent contractors, are competent to perform a thorough inspection of a mobile home prior to its tender to a retail customer to determine whether a home contains defects covered by the aforesaid warranty.

(g) The failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, actually perform or assure the performance of a thorough inspection of a mobile home prior to its tender to a retail customer to determine whether a home contains defects covered by the aforesaid warranty.

(h) The failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four, either directly or by action through independent contractors, are competent to perform the installation or "setup" of the aforesaid mobile homes at the homesite selected by the retail purchaser.

(i) The failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, actually and competently perform the installation or "setup" of the aforesaid mobile homes.

(j) The failure to maintain an adequate and expert factory service capability or to make other provisions adequate to assure the full performance within a reasonable time of the repair of defects covered by the aforesaid warranty which respondents' "authorized" dealers are unwilling or unable to perform.

The aforesaid failure to maintain a regular and effective system which assures the full performance within a reasonable time of service and repair of defects covered by the aforesaid warranty has the capacity or tendency to impede, delay or prevent the performance of said service and repairs for parties to whom the warranty is offered.

PAR. 9. By and through the aforesaid acts and practices respondents have been and are now:

(a) Disseminating a warranty which fails to fully and completely inform purchasers as to the actual protection offered by respondents.

(b) Failing to establish or maintain an effective or adequate system which assures that respondents will fully correct or repair all defects covered by the aforesaid warranty within a reasonable time.

The aforesaid acts and practices are deceptive and are in violation of Section 5 of the Federal Trade Commission Act.

PAR. 10. By such failure to maintain a regular and effective system which assures that every party to whom the warranty is provided will receive full performance within a reasonable time of the service and repair of defects covered by the aforesaid warranty respondents have been and now are engaged in unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 11. Through the individual and cumulative acts and practices set forth in Paragraph 8(a) respondents are now and have been disseminating and causing the dissemination of a written warranty which fails to fully and accurately describe the true nature and extent of the warranty rights of retail purchasers of respondents' mobile homes and those warranty obligations which in fact respondents undertake in the normal course of business. Thus respondents have failed to disclose material facts which if known to consumers:

(a) Would be likely to affect their decision of whether to purchase one of respondents' mobile homes, and

(b) Would enable retail purchasers to understand the true nature and extent of their warranty rights and to secure performance of such warranty service.

Therefore, the aforesaid failures to disclose material facts are deceptive and unfair and are in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Fleetwood Enterprises, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 3125 Myers St., P.O. Box 7638, Riverside, Calif.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

1. *It is ordered*, That respondents shall within 90 days from the effective date of this order make a written inquiry of all known retail purchasers of respondents' mobile homes (except those specifically excluded below) built between July 1, 1972 and June 30, 1974, utilizing the form of letter shown in Appendix A attached hereto and made a

part hereof which shall contain therein a self-addressed postage paid return envelope, and which shall be mailed to such purchasers by first class mail.

Known retail purchasers are defined as those first purchasers at retail of said mobile homes who communicate with respondents no later than 60 days after the effective date of this order and those first retail purchasers whose names and addresses (1) are contained in company "coach" or unit files and tire records (except that with respect to respondents' manufacturing plants which maintained for the period July 1, 1972 to June 30, 1974 separate files for warranty registration cards the names and addresses of known retail purchasers may be established from such separate files rather than by reference to "coach" or unit files); (2) are supplied by the Federal Trade Commission within 60 days of the effective date of this order or; (3) are supplied to respondents by respondents' past and current dealers in response to respondents' letter request for such information sent by first class mail, (which letters shall be sent no later than 30 days after the effective date of this order) utilizing the form of letter shown in Appendix B attached hereto and made a part hereof and which shall contain therein a self-addressed postage paid return envelope.

Notwithstanding the above, known retail purchasers shall not include:

(a) local, State or Federal Governments or agencies thereof;

(b) retail purchasers who are now or have been engaged in litigation with respondents involving their mobile home built by respondents during the two year period set forth hereinabove;

(c) retail purchasers whose homes were sold to them on an "as is, where is" basis;

(d) retail purchasers who communicated directly with respondents' corporate headquarters or its attorneys concerning a problem or defect in such purchaser's mobile home, where there is a record indicating a resolution of the problem to the purchaser's satisfaction;

(e) retail purchasers whose names are supplied by past or current dealers in response to respondents' written inquiries set forth hereinabove when such names are received by respondents from a dealer more than sixty days after respondents' inquiry was mailed to that dealer unless the purchaser or purchasers themselves communicate with respondents no later than 60 days after the effective date of this order, or the name or names of such purchaser or purchasers appear elsewhere in respondents' individual unit or coach files, (or where applicable, warranty card files) or were supplied to respondents by the Federal Trade Commission as set forth hereinabove;

(f) retail purchasers who live outside the United States or who purchased mobile homes from dealers located outside the United States;

(g) retail purchasers who are known to respondents to no longer own their mobile homes built by respondents.

2. *It is further ordered*, That respondents shall, directly or through their dealers or other third parties, repair or service within a reasonable time at the site of the home (in the normal course not to exceed ninety days from the date on which the letter to a given retail purchaser referred to in order Paragraph 1 is returned and received by respondents) all defects and malfunctions in mobile homes produced by respondents during the two year period referred to hereinabove which become known pursuant to order Paragraph 1 unless it is clear that a given defect or malfunction:

(a) is a result of improper setup of the mobile home;

(b) is a result of improper use or abuse of the mobile home;

(c) did not arise or become evident within the term of the warranty;

(d) was brought to respondents' attention by a retail purchaser more than sixty days after respondents mailed the written inquiry to such purchaser as *provided* hereinabove where the home was purchased by the first retail purchaser more than one year prior to the effective date of this order;

(e) is a minor cosmetic defect in a home purchased by the first retail purchaser more than one year prior to the effective date of this order.

3. *It is further ordered*, That respondents cease and desist from disseminating, or causing the dissemination of, offering or otherwise providing, in commerce, any express warranties to the retail purchasers of respondents' mobile homes unless respondents meet all of their obligations under such warranties within the time period standards set forth hereinbelow in order Paragraph 3(e) and establish and maintain a regular and effective system reasonably designed to assure that every purchaser of the aforesaid mobile homes will receive full performance by respondents, directly or by action through their dealers or other third parties, of all such warranty obligations within the said time period standards. This warranty performance system shall incorporate but not necessarily be limited to the following standards and terms:

(a) Respondents shall disseminate a warranty and associated documents which clearly and fully describe and effectively communicate to the first retail purchaser;

(1) the identity and address of the warrantor;

(2) the nature and extent of the warranty offered or otherwise provided;

(3) the remedies available to the purchaser under the warranty;

(4) the manner in which respondents intend to provide for

performance of their warranty obligations, including disclosure of any delegation of warranty responsibility to third parties; *Provided, however*, that disclosure of said delegation must be accompanied by additional disclosure that such delegation in no way relieves respondents of the ultimate responsibility to fulfill all of respondents' warranty obligations;

(5) any and all requirements which must in fact be fulfilled by the purchaser as a condition precedent to securing performance by respondents of their warranty obligations;

(6) a uniform procedure to be followed by a purchaser in order to request performance by respondents of their warranty obligations;

(7) a uniform procedure available to the purchaser for a systematic review and disposition of complaints and disputes with respect to the performance of respondents' warranty obligations by respondents' manufacturing plants, subsidiaries, divisions, and other employees, or by respondents' dealers or other third parties.

(b) Respondents shall cease and desist from selling their mobile homes without any express or implied warranty, *i.e.*, "as is, where is," or with any disclaimer of implied warranties or limitations or exclusion of liability under any warranty or disseminating or causing the dissemination of any statement or representation which represents directly or by implication, that respondents have disclaimed and express or implied warranty or limited or excluded any liability under any warranty unless respondents have a reasonable basis in the form of an opinion by legal counsel that said disclaimers, limitations and exclusions are enforceable under governing State law, and clear and conspicuous notice of said "as is, where is" sale or other said disclaimer, limitation or exclusion is given to prospective retail purchasers of their mobile homes prior to the execution of the contract of retail purchase. A clear and conspicuous notice of an "as is, where is" sale shall contain the following language:

NOTICE

The manufacturer of this mobile home sells it "as is, where is" and refuses to assume any responsibility for defects. The purchaser of this mobile home must accept it with all defects and take the entire risk, under contract law, as to its condition.

Provided however, That with respect to: (a) the "as is, where is" sale of damaged, salvaged, demonstrator or repossessed mobile homes, (b) the sale of mobile homes where respondents disclaim or fail to grant an express warranty on appliances which are covered by a separate written warranty by a supplier or manufacturer other than respondents and (c) the "as is, where is" sale of mobile homes to local, State and Federal Governments or agencies thereof, the aforesaid opinion by legal counsel shall not be required.

(c) All of respondents' warranty service and repair obligations performed subsequent to the tender of the home to the retail purchaser shall be rendered by respondents, directly or through their dealers or other third parties at the site of the mobile home.

(d) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealers or any other persons not employees of respondents to:

(i) Determine whether any mobile home manufactured by respondents contains defects which are within the scope of a warranty extended by respondents or otherwise requires remedial action pursuant to said warranty;

(ii) notify respondents of the existence of those circumstances enumerated in subparagraph (d)(i) above; or

(iii) perform any repairs or otherwise provide services in satisfaction of any warranty obligations incurred by respondents;

Respondents shall, beginning within 120 days of the effective date of this order, assure that if a dispute or disagreement should arise between respondents and one or more of said dealers or other third persons as to which of them is to incur any such duty, burden or responsibility with respect to warranty repairs and service or is to correct a malfunction related or alleged to relate to setup of the aforesaid mobile homes, any and all necessary repairs or other corrective action will be expeditiously provided (in the normal course of business) in a manner consistent with this order, regardless of whether the said dispute or disagreement has been resolved. The "normal course of business" does not include:

(1) conditions under which abnormal demands are made upon service capabilities as a result of natural disasters, other acts of God or the government (including the effects of remedial action required of respondents as set forth in order Paragraphs 1 and 2, above), or any other event beyond the control of respondents and their dealers which places an unusually large demand upon service facilities;

(2) conditions resulting from disasters, strikes, acts of the government, instances of force majeure or other similar occurrences which are beyond the control of respondents and their dealers and which prevent respondents and their dealers from responding to service requests within the time periods stated hereinbelow;

(3) slight omissions or deviations from the terms of this order which are inadvertent, unintentional, and not due to bad faith of respondents;

(e)(1) Respondents shall, beginning within 120 days of the effective date of this order, directly or through their dealers or other third parties commence, in the normal course of business as set forth in order Paragraph 3(d) above, all warranty service or repairs of defects giving rise to a condition which affects the safety of a mobile home or renders it substantially uninhabitable, as soon as possible but in no event later than three business days following receipt of notice of such defect by respondents from the retail purchaser, or two business days following notice of the determination made by respondents' dealer pursuant to order Paragraph 3(i)(3)(iii) below, and shall complete such service or repairs expeditiously.

(2) Respondents shall, except as set forth in order Paragraph 3(e)(1) above, beginning within 120 days of the effective date of this order, directly or through their dealers or other third parties, in the normal course of business, as set forth in order Paragraph 3(d) above: (a) respond to notice of the need for warranty service or repairs within a reasonable time not to exceed seven business days of receipt of said notice by respondents or their dealers and (b) complete said service or repairs within a reasonable time not to exceed thirty days following said receipt of notice.

(3) *Provided however;* That in the event of a bona fide dispute between respondents or their dealers and a retail purchaser requiring resolution through the procedure established pursuant to order Paragraph 3(m) below, as to whether the defect(s) complained of by the retail purchaser are or are not covered by respondents' warranty, then: In the event it is determined that warranty service or repair is required, which determination shall be made promptly respondents shall be allowed, in the normal course of business as set forth in order Paragraph 3(d) above, from the date of notification of the dispute as set forth in this subparagraph (e)(3) no more than three business days in the case of defects referred to in subparagraph (e)(1) above, to commence service or repair (such repairs to be completed expeditiously), and no more than thirty days in the case of defects referred to in subparagraph (e)(2) above to complete service or repair.

(f) Respondents shall, except as provided in order Paragraph 3(h) below, in the normal course of business as set forth in order Paragraph 3(d) above, beginning within 120 days of the effective date of this order, inspect at the home site directly or through their dealers or other third parties, each mobile home prior to or at the time of tender of possession to the retail purchaser to assure that the home is being delivered to such purchaser free of all ascertainable defects and is properly setup, except for deficiencies which do not affect the home's safety or habitability, which shall be noted in the owner dealer final delivery checklist (Appendix C), and which shall be then remedied in accordance with subparagraph (e)(2) above.

(g) Respondents shall, except as provided in order Paragraph 3(h) below, in the normal course of business as set forth in order Paragraph 3(d) above, beginning within 120 days of the effective date of this order, reinspect, directly or through their dealers or other third parties each mobile home between twenty-five and forty-five days after tender of possession to the retail purchaser to determine the existence of and to correct or arrange for the correction of any defects covered by respondents' warranty in the mobile home, or improper setup and problems arising therefrom.

Results of each of the inspections required in order Paragraphs 3(f) and 3(g) hereinabove will be documented in a report or reports which shall be required to be signed by respondents' dealer and if possible by the retail purchaser or said purchaser's representative, indicating agreement with the information set forth therein. The reports documenting the results of the aforesaid inspections may be in the formats set forth in Appendices C and D attached hereto, or in formats substantially equivalent thereto.

(h) If the retail purchaser elects to provide for the setup of his mobile home himself, then in such cases the responsibility of respondents and their dealers for transportation, setup, inspection and reinspection, as set forth in subparagraph (f) and (g) above, shall terminate with the delivery or tender of possession to the retail purchaser or his agent or representative.

(i) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealers to perform the duties set forth in order Paragraph 3(d) above, respondents shall enter into written contractual agreements with such dealers which:

1) adequately and accurately describe the scope of those duties, to be borne by said dealers as aforesaid, as well as the responsibility for properly setting up respondents' mobile homes;

2) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) to provide respondents with the name and address of each retail purchaser and the date of each purchase;

3)(i) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i), to commence all warranty service, or repair of defects, giving rise to a condition which affects the safety of a mobile home or renders it substantially uninhabitable as soon as possible but in no event later than three business days following receipt by the dealer of notice of such defect or condition and to complete such service or repairs expeditiously;

(ii) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i), to complete all other warranty service or repairs within a reasonable time, not to exceed thirty days following receipt by the dealer of notice of such condition;

(iii) set forth that the requirements of subparagraph (i)(3)(i) and (i)(3)(ii) above shall apply only to those cases in which the dealer responds to and completes the service or repairs himself. In those cases in which the dealer determines to rely upon respondents to perform or to complete service or repairs requested by retail purchasers under:

(a) subparagraph (i)(3)(i) above, such determination shall be made and communicated to respondents as soon as possible but in no event later than two business days after dealer's receipt of notice from the retail purchaser.

(b) subparagraph (i)(3)(ii) above, such determination shall be made and communicated to respondents as soon as possible but in no event later than five business days of receipt of notice from the retail purchaser.

(4) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) to inspect each mobile home prior to or at the time of tender of possession to the retail purchaser as set forth in order Paragraph 3(f), except as provided in subparagraph (h) above to assure that the home is being delivered to such purchaser free of all ascertainable defects and is properly set up, except for deficiencies which do not affect the home's safety or habitability which shall be noted in the owner dealer final delivery checklist (Appendix C), and which shall then be remedied in accordance with subparagraph (i)(3)(ii) immediately above.

(5) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i), except as provided in subparagraph (h) above to reinspect each mobile home between twenty-five and forty-five days after tender of possession to the retail purchaser to determine the existence of and to correct or arrange for the correction of any defects in the mobile home covered by respondents' warranty or improper setup and problems arising therefrom;

(6) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) to provide respondents with reports which will document the results of the inspections set forth in (4) and (5) immediately above and which will be signed by respondents' dealer and if possible by the retail purchaser or said retail purchaser's representative indicating agreement with the information set forth therein;

(7) provide for a procedure which assures that if a dispute or disagreement should arise between respondents and one or more of said dealers as to which of them is to incur any such duty, burden or

responsibility or is to correct an improper initial setup or a malfunction arising therefrom, any and all necessary repairs or other corrective action will be expeditiously provided, regardless of whether the said dispute or disagreement has been resolved;

(8) establish the duty of the dealer to maintain or contract for adequate service personnel and facilities;

(9) set forth service responsibilities in the event of termination of a dealer with respect to homes still under warranty or in the possession of the dealer and not yet sold to a retail purchaser at the time of termination;

(10) set forth the right of respondents to withdraw authorization from dealers failing to meet their responsibilities under the agreement.

Existing dealers authorized by respondents as of the effective date of this order shall execute such agreements (which agreements shall be immediately effective) within 180 days of the effective date of this order, or shall be terminated by respondents. Other dealers authorized by respondents later than the effective date of this order shall execute such agreements at the time of their authorization.

Such agreement shall be in the format set forth in Appendix E attached hereto or in a format substantially equivalent hereto.

The "normal course of business" as used in this order Paragraph 3(i) shall not include: (1) conditions under which abnormal demands are made upon service capabilities as a result of natural disasters, other acts of God or the government, or any other event beyond the control of the dealer which places an unusually large demand upon the dealer's service facilities; (2) conditions resulting from disasters, strikes, acts of the government, instances of force majeure or other occurrences which are beyond the control of the dealer which prevent the dealer from responding to service requests within the time periods stated hereinabove; (3) slight omissions or deviations from the terms of this order subparagraph which are inadvertent, unintentional and not due to bad faith of dealer.

(j) Respondents shall send a questionnaire (using the format set forth in Appendix F attached hereto or in a format substantially equivalent thereto) to all persons other than "as is, where is" purchasers who after the effective date of this order purchase at retail respondents' mobile homes which inquires as to:

(1) the existence of any defects in said mobile homes covered by respondents' warranty or improper setup or problems arising therefrom;

(2) whether the retail purchaser notified anyone of such defects or setup problems, and if so who was notified and when did such notification take place;

(3) the identity of any person who sought to service such defects or setup problems;

(4) whether such defects or setup problems were fully repaired, the period of time required to effect such repairs, and the identity of the parties who accomplished such repairs;

(5) whether the retail purchaser is satisfied with the promptness and quality of the repair.

Such questionnaire in the form of a postage paid self-addressed post card or a letter containing a postage paid self-addressed envelope, shall be sent between sixty and ninety days subsequent to the tender of possession of the home to the retail purchaser.

(k) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealer or any other persons not employees of respondents to perform any of the responsibilities or duties set forth in order Paragraph 3(d) hereinabove, respondents shall fully evaluate the level of expertise and physical and personnel resources of such dealers or other persons with respect to the ability to inspect, repair, service and setup all mobile homes manufactured by respondents prior to such delegation or reliance to assure that all said persons are capable of performing said responsibilities or have provided for such performance through a third party having such capability, in accordance with the standards set forth herein.

Respondents shall in addition regularly review and evaluate the manner in which such persons, directly or through another third party, perform the aforesaid responsibilities and maintain their service capabilities and shall withdraw said reliance and authorization from persons failing to meet those responsibilities or the standards set forth herein.

(l) The direct administration of respondents' warranty service program at the corporate level and the responsibility for supervising and assuring implementation of the warranty service program shall, beginning within 120 days of the effective date of this order, be vested in only those corporate officials who have no direct responsibilities on a day-to-day basis for the sale of respondents' mobile homes. The person or persons to whom the responsibility for supervising and assuring the implementation of the program is delegated shall make periodic reports at least on a monthly basis to respondents' responsible officers which shall include current information concerning:

(1) the current cost to respondents of warranty service;

(2) the incidence and nature of frequently recurring defects;

(3) those measures undertaken in response to reports of frequently recurring defects including but not limited to modification in production and design of respondents' mobile homes;

(4) analysis of the manner in which respondents' employees, dealers and other third parties are performing warranty and set up responsibilities.

(m) Respondents shall, beginning within 120 days of the effective date of this Order, establish a uniform procedure for the systematic receipt and analysis and fair disposition of all complaints or disputes which may arise between the aforesaid retail purchasers of respondents' mobile homes and respondents or respondents' dealers or other third parties, regarding any alleged warranty obligations of respondents.

Such procedure shall incorporate but not necessarily be limited to:

(1) prompt evaluation and response by respondents to all complaints within a reasonable time not to exceed five business days after receipt by respondents;

(2) the designation of a single focal point within the corporation for the receipt of said complaints;

(3) an effective mechanism for the fair and impartial resolution of such disputes by corporate level personnel not responsible for sales on a day-to-day basis;

(4) an accurate and complete record keeping system regarding the nature and disposition of all such disputes and complaints received by respondents;

(5) periodic review and evaluation by respondents of the effectiveness of such procedures and correction of such procedures where necessary.

(n) Respondents shall, beginning within 120 days of the effective date of this Order, maintain full and adequate records which disclose.

(1) the date of receipt, disposition and the date of disposition of each request for warranty service (including any refusal to accept a request and the reason for such refusal) received by respondents; and

(2) the results of the evaluation of service capacity provided for in Order Paragraph 3(k) above.

4. *It is further ordered*, That respondents shall forthwith distribute a copy of this order to each of their operating divisions or manufacturing plants engaged in the manufacture, offering for sale, sale, and distribution of mobile homes.

5. *It is further ordered*, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in the corporation which may affect compliance obligations arising out of this order.

6. *It is further ordered*, That respondents shall, at intervals of 9, 18,

and 24 months following the effective date of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order. Such reports shall include but not be limited to the periodic reports submitted to respondents' responsible officers described in order Paragraph 3(1) above.

7. *It is further ordered,* That respondents shall furnish to the Commission nine months after the effective date of this order, a report which discloses the dates and manner in which dealers and retail purchasers were contacted pursuant to the procedures described in order Paragraph 1 above, and the dates and manner in which dealers and retail purchasers acted in response thereto and the dates and manner in which respondents acted in response to allegations by retail purchasers which purported to create an obligation on the part of respondents under the terms of order Paragraph 2 above. Respondents shall for a period of two years after the effective date of this order maintain records which are adequate to disclose respondents' compliance with order Paragraphs 1 and 2, in order that such records may be furnished by respondents to the Federal Trade Commission upon request.

8. *It is further ordered,* That respondents shall submit to the Federal Trade Commission for its review copies of any proposed substantial revisions in the questionnaire required pursuant to order Paragraph 3(j), the dealer agreement required pursuant to order Paragraph 3(i), and the warranty documents described in order Paragraph 3(a), at least 60 days prior to the proposed effective date of any such revisions. Such submissions will be required for the three years following the effective date of this order.

APPENDIX A

FLEETWOOD ENTERPRISES, INC.

[Depiction of trademark symbol]

3125 MYERS STREET — P.O. BOX 7638, CALIFORNIA 92503
TELEPHONE (714) 785-3500

(Date)

Dear Mobile Home Owner:

Thank you for purchasing one of Fleetwood Enterprises, Inc.'s mobile homes. Our homes are warranted for one year to be free from defects in material and workmanship. Any repairs required by this warranty should have been performed in full by the dealer who sold you your home or, if this was not possible, by the factory which manufactured it.

Through the following questionnaire, we are seeking to determine your experience with regard to service so that we may be sure you have received full performance of warranty obligations. If you have not received such full performance, your response to the following questions will enhable us to provide you with the warranty service to which you are entitled. Please respond to the following questions and return this letter to Fleetwood Enterprises, Inc. in the enclosed postage-paid envelope. (If the space provided below is not adequate, please use an additional page.)

(1) Have you experienced any problems with your mobile home which you feel are covered under our warranty? If so, please describe them and indicate when the problem occurred. ____________________

____

____

____

(2) If you did experience a problem, please advise us of whom you contacted and when the contact was made. ____________________

____

____

(3) If you did experience a problem, how long did it take to correct the problem and who provided the service? ____________________

____

____

(4) If service was required, were you satisfied with the promptness, quality, and completeness of any required repairs? ____________________

____

____

____

(5) Who performed the set-up or installation of your home?

☐ **Dealer**

____
(Name)

☐ **Independent Contractor**

____
(Location)

☐ **Park Operator**

(6) Are you satisfied with the manner in which your mobile home was set-up or installed? ______________________________

____

____

(7) Please advise us of any suggestions that you might have that will enable us to increase the quality, utility, and value that we strive to build into our homes. ______________________________

____

____

____

We thank you for responding to the questions set forth above. Please return this letter to us in the enclosed postage-paid envelope.

Sincerely,

FLEETWOOD ENTERPRISES, INC.

Manager of Consumer Affairs

Enclosure

APPENDIX B

(Subsidiary Company Letterhead)

Gentlemen:

Pursuant to an agreement with the Federal Trade Commission, we are securing the name and address of all retail purchasers of our mobile homes built since July 1, 1972. Dealer submission of some of this information is necessary since our records fail to provide the information for a substantial number of homes

According to our records you purchased from us the mobile homes described by the serial numbers set forth below for which we have no record of the retail purchasers. Please fill in the names and addresses of the retail purchasers of these units and date of sale and return this letter in the postage-paid envelope provided within 21 days after receipt, as called for by the above agreement.

Sales Manager

SERIAL NUMBER	DATE OF RETAIL SALE	CUSTOMER'S NAME AND ADDRESS
______________	______________	____________________________
		____________________________
______________	______________	____________________________
		____________________________
		____________________________

______________________, ______________________ Page ____ of ____
Dealer Location

SERIAL NUMBER	DATE OF RETAIL SALE	CUSTOMER'S NAME AND ADDRESS
____________	__________	________________________ ________________________ ________________________
____________	__________	________________________ ________________________ ________________________
____________	__________	________________________ ________________________ ________________________
____________	__________	________________________ ________________________ ________________________
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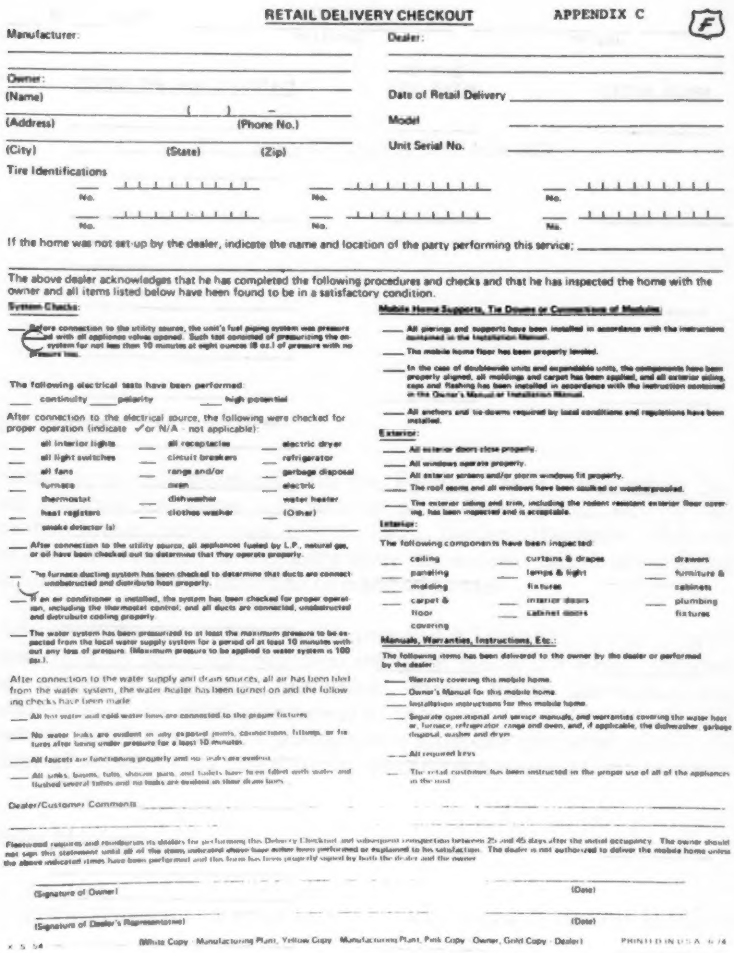

RETAIL DELIVERY CHECKOUT

APPENDIX C

Manufacturer: ___

Dealer: ___

Owner: ___
(Name)

( ) -
(Address) (Phone No.)

(City) (State) (Zip)

Date of Retail Delivery ___

Model ___

Unit Serial No. ___

Tire Identifications

___ No. ___ No. ___ No.

___ No. ___ No. ___ No.

If the home was not set-up by the dealer, indicate the name and location of the party performing this service; ___

The above dealer acknowledges that he has completed the following procedures and checks and that he has inspected the home with the owner and all items listed below have heen found to be in a satisfactory condition.

System Checks:

___ Before connection to the utility source, the unit's fuel piping system was pressure tested with all appliance valves opened. Such test consisted of pressurizing the entire system for not less than 10 minutes at eight ounces (8 oz.) of pressure with no pressure loss.

The following electrical tests have been performed:

___ continuity ___ polarity ___ high potential

After connection to the electrical source, the following were checked for proper operation (indicate ✓or N/A - not applicable):

___ all interior lights
___ all light switches
___ all fans
___ furnace
thermostat
___ heat registers
___ smoke detector (s)

___ all receptacles
___ circuit breakers
___ range and/or
oven
___ dishwasher
___ clothes washer

___ electric dryer
___ refrigerator
___ garbage disposal
___ electric
water heater
___ (Other)
___

___ After connection to the utility source, all appliances fueled by L.P., natural gas, or oil have been checked out to determine that they operate properly.

___ The furnace ducting system has been checked to determine that ducts are connected, unobstructed and distribute heat properly.

___ If an air conditioner is installed, the system has been checked for proper operation, including the thermostat control; and all ducts are connected, unobstructed and distrubute cooling properly.

___ The water system has been pressurized to at least the maximum pressure to be expected from the local water supply system for a period of at least 10 minutes without any loss of pressure. (Maximum pressure to be applied to water system is 100 psi.).

After connection to the water supply and drain sources, all air has been bled from the water system, the water heater has been turned on and the following checks have been made:

___ All hot water and cold water lines are connected to the proper fixtures.

___ No water leaks are evident in any exposed joints, connections, fittings, or fixtures after being under pressure for a least 10 minutes.

___ All faucets are functioning properly and no leaks are evident.

___ All sinks, basins, tubs, shower pans, and toilets have been filled with water and flushed several times and no leaks are evident in their drain lines.

Mobile Home Supports, Tie Downs or Connections of Modules:

___ All pierings and supports have been installed in accordance with the instructions contained in the Installation Manual.

___ The mobile home floor has been properly leveled.

___ In the case of doublewide units and expandable units, the components have been properly aligned, all moldings and carpet has been applied, and all exterior siding, caps and flashing has been installed in accordance with the instruction contained in the Owner's Manual or Installation Manual.

___ All anchors and tie-downs required by local conditions and regulations have been installed.

Exterior:

___ All exterior doors close properly.

___ All windows operate properly.

___ All exterior screens and/or storm windows fit properly.

___ The roof seams and all windows have been caulked or weatherproofed.

___ The exterior siding and trim, including the rodent resistant exterior floor covering, has been inspected and is acceptable.

Interior:

The following components have been inspected:

___ ceiling
___ paneling
___ molding
___ carpet & floor covering

___ curtains & drapes
___ lamps & light fixtures
___ interior doors
___ cabinet doors

___ drawers
___ furniture & cabinets
___ plumbing fixtures

Manuals, Warranties, Instructions, Etc.:

The following items has been delivered to the owner by the dealer or performed by the dealer:

___ Warranty covering this mobile home.

___ Owner's Manual for this mobile home.

___ Installation instructions for this mobile home.

___ Separate operational and service manuals, and warranties covering the water heater, furnace, refrigerator, range and oven, and, if applicable, the dishwasher, garbage disposal, washer and dryer.

___ All required keys

___ The retail customer has been instructed in the proper use of all of the appliances in the unit.

Dealer/Customer Comments ___

Fleetwood requires and reimburses its dealers for performing this Delivery Checkout and subsequent reinspection between 25 and 45 days after the initial occupancy. The owner should not sign this statement until all of the items indicated above have either been performed or explained to his satisfaction. The dealer is not authorized to deliver the mobile home unless the above indicated items have been performed and this form has been properly signed by both the dealer and the owner.

___ (Signature of Owner) ___ (Date)

___ (Signature of Dealer's Representative) ___ (Date)

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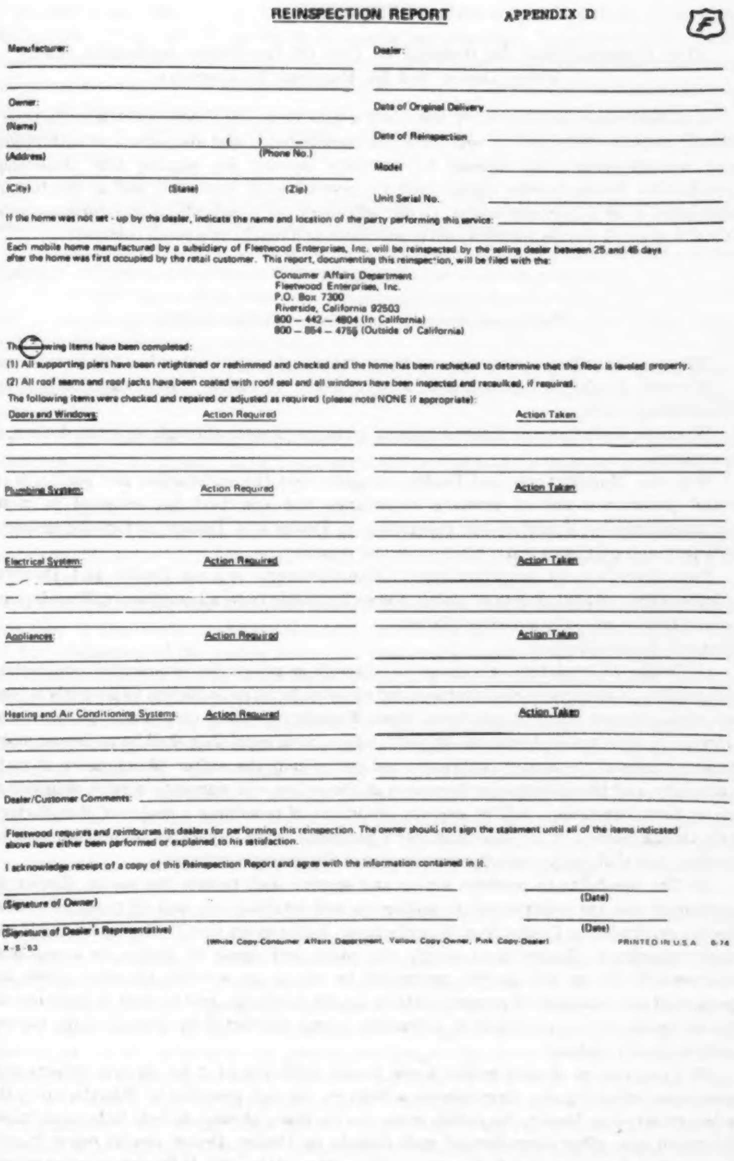

REINSPECTION REPORT APPENDIX D

Manufacturer:

Dealer:

Owner:

(Name)

(Address) ( ) – (Phone No.)

(City) (State) (Zip)

Date of Original Delivery

Date of Reinspection

Model

Unit Serial No.

If the home was not set - up by the dealer, indicate the name and location of the party performing this service:

Each mobile home manufactured by a subsidiary of Fleetwood Enterprises, Inc. will be reinspected by the selling dealer between 25 and 45 days after the home was first occupied by the retail customer. This report, documenting this reinspection, will be filed with the:

Consumer Affairs Department
Fleetwood Enterprises, Inc.
P.O. Box 7300
Riverside, California 92503
800 – 442 – 4804 (In California)
800 – 854 – 4755 (Outside of California)

The following items have been completed:

(1) All supporting piers have been retightened or reshimmed and checked and the home has been rechecked to determine that the floor is leveled properly.

(2) All roof seams and roof jacks have been coated with roof seal and all windows have been inspected and recaulked, if required.

The following items were checked and repaired or adjusted as required (please note NONE if appropriate):

Doors and Windows: Action Required Action Taken

Plumbing System: Action Required Action Taken

Electrical System: Action Required Action Taken

Appliances: Action Required Action Taken

Heating and Air Conditioning Systems: Action Required Action Taken

Dealer/Customer Comments:

Fleetwood requires and reimburses its dealers for performing this reinspection. The owner should not sign the statement until all of the items indicated above have either been performed or explained to his satisfaction.

I acknowledge receipt of a copy of this Reinspection Report and agree with the information contained in it.

(Signature of Owner) (Date)

(Signature of Dealer's Representative) (Date)

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APPENDIX E

(The Following Shall Be Included As Part Of The Dealer Application Which Every Dealer Will Be Required To Execute)

Attached hereto as Exhibit A and made a part hereof is Fleetwood's Manufacturer-Dealer Service Policy, which sets forth the requirements and obligations of both dealer and manufacturer with respect to warranty service. By signing this Dealership Application, Dealer hereby agrees with the provisions of Exhibit A and agrees that, if appointed as an authorized dealer, Dealer will carry out it obligations in accordance with Exhibit A on all mobile homes which it purchases and resells to a retail customer.

Exhibit A

Fleetwood Manufacturer-Dealer Service Policy

Whereas, Manufacturer is engaged in the manufacture and sale of mobile homes; and

Whereas, Dealer desires to act as a retail dealer of mobile homes manufactured by Manufacturer and;

Whereas, Manufacturer disseminates to retail purchasers through its retail dealers, a warranty;

Whereas, Manufacturer and Dealer recognize that the satisfaction and good will of retail purchasers are of primary importance and can best be achieved in most circumstances by Manufacturer delegating to Dealer and Dealer performing prompt, efficient, and courteous warranty service and repairs.

Now therefore, in consideration of Manufacturer's sale to Dealer and Dealer's purchase from Manufacturer of mobile homes for resale to retail purchasers, Manufacturer and Dealer mutually agree as follows:

Dealer's Responsibilities

(1) Dealer will maintain, or arrange for through an acceptable independent contractor, a capability as to personnel, equipment and physical facilities sufficient to properly set-up all mobile homes which it purchases from Manufacturer and to perform all warranty service on such mobile homes as set forth below. Such capability shall be reviewed prior to acceptance of the dealer application and periodically thereafter. Maintenance of such capability, and the effective performance of the set-up and warranty service obligations as set forth hereunder shall be express conditions of remaining a dealer of Manufacturer's mobile homes. If, in Manufacturer's judgment, such capability of performance is lacking, this shall be grounds for termination of the dealer relationship.

(2) The capability to perform set-up and service shall include the use by Dealer of personnel who are experienced in setting up and servicing any and all types of mobile homes purchased by Dealer from Manufacturer. In the event that Dealer's personnel lack such experience, Dealer must notify the plant and agree to utilize an acceptable independent set-up and service contractor to set-up (or service) all units which its personnel are incapable of properly setting up (or servicing), and to send at least one of its set-up or service personnel to a training course conducted by Manufacturer before setting up any such unit.

(3) Upon receipt of each mobile home, Dealer shall inspect it for obvious defects and shortages, indicating any shortages on a Delivery Receipt provided by Manufacturer. If, when received by Dealer, the mobile home has too many obvious defects to be acceptable for retail sale, after correction of such defects by Dealer, Dealer should reject it and contact the plant immediately to arrange disposition of the unit. If Dealer does not reject the unit, he shall be expected to correct any defects (except as otherwise set forth herein), whether or not such defects were apparent at the time of delivery.

(4) Dealer shall assume full financial responsibility for and shall perform or arrange for the performance of, the set-up of the mobile home on a site designated by the retail consumer (unless such consumer shall have given Dealer a written release from this obligation in a form approved by Manufacturer, a copy of which shall be transmitted to the plant). Set-up of the mobile home shall be performed in accordance with the Set-Up Instructions provided by Manufacturer, and particular attention will be paid to the following items:

(a) proper leveling of the home.

(b) a check and, if necessary, adjustment of all interior and exterior doors and windows so that each works freely and catches or locks properly.

(c) connection of all utilities to the appropriate supply or drain sources, and the testing of utilities and appliances to determine that they function properly.

(d) installation of all items which cannot be installed in the factory.

(e) the performance of any other operations, such as installing tie-downs, which may be required by local or state codes.

(f) as to multiple and expanding units, the proper mating of the mobile home sections and the proper connection of the structure, including the application of roof caps, siding, etc.

(g) weatherproofing of the roof, especially at joints and at points where any fasteners such as screws have been removed or inserted to connect appliances or accessories.

(h) weatherproofing of all windows.

(5) Prior to turning the mobile home over to the retail consumer for permanent occupancy Dealer or his representative will inspect the home again to make sure that it is fit for occupancy, and is free of all defects which affect the safety of the mobile home or render it substantially uninhabitable, and will fill out the Retail Delivery Checkout form provided by Manufacturer, listing the retail consumer's name and address, and the date of first occupancy of the mobile home. The customer's signature on this report will be obtained as specified. Copies of the Retail Delivery Checkout form will be forwarded in a timely manner by Dealer to Manufacturer in accordance with the instructions provided.

(6) In addition, Dealer or his representative will reinspect the mobile home between 25 and 45 days after the date of first occupancy to determine if there are any defects or problems concerning the mobile home or its set-up. At, or shortly following this inspection, Dealer will make or arrange for any required repairs, will relevel the home and will file a Reinspection report with Manufacturer on the form provided by Manufacturer. This form will be signed by the customer indicating his agreement with the information contained in the report. Such report will be promptly forwarded to Manufacturer.

(7) Dealer will perform, or arrange for the performance of, and will be financially responsible for, all repairs to each mobile home sold by him which may be required under Manufacturer's warranty which Dealer can perform. This shall include all repairs other than those listed under "Manufacturer's Responsibilities" below.

(8) Repairs, or other appropriate action, to correct any defect which affects the safety of a mobile home or renders it substantially uninhabitable will be commenced in the normal course of business as set forth in Paragraph (13) below by Dealer within three business days following receipt of notice of such defect or condition by Dealer, and such repairs or other action will be completed expeditiously. If the defect is one covered under "Manufacturer's Responsibilities" below, Dealer shall notify the Manufacturer within 2 business days following receipt of notice of such defect by Dealer and the repair shall be handled as set forth below in Paragraph (17).

(9) Dealer will respond in the normal course of business as set forth in Paragraph (13) below to notice of the need for warranty service or repairs other than as set forth in

Paragraph (8) above, within seven business days of receipt of such notice, and shall complete all such service or repairs within a reasonable time, not to exceed thirty days following receipt of such condition. If the defect is one covered under "Manufacturer's Responsibilities" below, Dealer shall notify the Manufacturer within 5 business days following receipt of notice of such defect by Dealer and the repair shall be handled as set forth below in Paragraph (17).

(10) In the event that problems occur with the set-up which Dealer does not correct, or if Dealer does not perform repairs which are his responsibility, in a timely manner as set forth in Paragraph (8) and (9) above, Manufacturer will assume responsibility for such repairs or corrections to the set-up and will bill Dealer for the cost incurred to correct these matters.

(11) Dealer will provide Manufacturer, in a timely manner, with a written report on a form provided by Manufacturer of each repair made by Dealer under the warranty on each mobile home sold by Dealer. Such report will include a description of the nature of the defect, the corrective action taken, and the party performing the repair.

(12) In the event that a retail consumer elects to provide for the set-up of the mobile home himself, then Dealer shall not be required to complete the Retail Delivery Checkout form or Reinspection report referred to above, but shall instead inform Manufacturer of such election by the retail consumer.

(13) The "normal course of business" does not include:

(a) conditions under which abnormal demands are made upon service capabilities as the result of natural disasters, other acts of God or the government, any other event beyond the control of Dealer which places an unusually large demand upon service facilities; and

(b) events such as disasters, strikes, acts of the government, instances of force majeure or other occurrences which are beyond the control of Dealer which prevent Dealer from responding to service requests within the time periods stated hereinabove in Paragraphs (8) and (9).

(c) slight omissions or deviations from the terms of this agreement which are inadvertent, unintentional, and not due to the bad faith of Dealer.

Manufacturer's responsibilities

(14) Manufacturer will supply Dealer with all material, which is not readily available, required to repair the mobile homes purchased by Dealer. If the material is required to correct damage or shortages noted on the Delivery Receipt, with which Manufacturer concurs, it will be supplied at no charge to Dealer. All other material will be billed to Dealer. Every effort will be made to ship the required material in accordance with Dealer's shipping instructions within five working days after it is requested. Upon request, any defective material will be returned by Dealer to Manufacturer.

(15) Manufacturer will return to Dealer the sum of $100, (which shall be added to the purchase price of each mobile home) by return mail not to exceed ten days after the receipt of the properly filled out Retail Delivery Checkout form and the Reinspection Report for each unit sold, provided that:

(a) the reinspection was performed between 25 and 45 days after the first occupancy by the retail customer;

(b) all service and repairs that are the responsibility of Dealer have been performed;

(c) the Reinspection Report bears the signature of the retail customer, and

(d) the Reinspection Report is received by Manufacturer's Consumer Affairs Department 60 days after first occupancy of the mobile home.

(If the retail customer will not sign the Reinspection Report and all required adjustments have been made, a written statement detailing the attempts made to obtain the customer's signature and the reasons for the customer's refusal to sign the

Reinspection Report should be filed with the Consumer Affairs Department. The Consumer Affairs Department's decision on disbursing the $100 will be final.)

(16) Approximately 90 days after the date of first occupancy of each mobile home, Manufacturer will send a questionnaire to each mobile home owner requesting information as to the satisfaction of the customer and any alleged defects in the mobile home or its set-up. Manufacturer will provide a copy of each returned questionnaire to Dealer and, if corrective action is required, Dealer shall arrange for and bear financial responsibility for such corrective action. (Unless such corrective action involves an item described below in Paragraph (17)).

(17) Manufacturer will, in a timely manner, perform or arrange for the performance of repairs, at its cost, which are beyond the reasonable capability of Dealer to perform. Such items will include the following:

(a) defective or broken rafters or side wall studs

(b) leaks in water lines in the floor

(c) short circuits and open circuits in the walls

(d) defects in the design of the mobile home

(e) breaks or defects in the mobile home chassis

(f) major repairs to appliances, which will be the ultimate responsibility of Manufacturer's appliance vendors

(g) major manufacturing defects resulting in structural failure

(h) other major manufacturing defects which Dealer cannot reasonably be expected to have the capability to repair which require the removal or application of interior or exterior wall, floor, or ceiling covering, or repairs to the chassis, of a character similar to those listed above.

(18) Manufacturer will select appliances for use in its mobile homes which are made by recognized manufacturers who have a service capability sufficient to provide reasonably available and capable service.

(19) Manufacturer will conduct training courses at its facility, at least every six months, to acquaint Dealer's set-up and service personnel (or the personnel of independent contractors utilized by Dealer) with the physical characteristics of mobile homes produced by Manufacturer and the recommended techniques for proper set-up and servicing of the mobile homes. Such training courses will be held at no cost to Dealer except for the cost of transportation and subsistence of the attending personnel of Dealer or his contractor.

Miscellaneous

(20) In the event that the manufacturer-dealer relationship is terminated for any reason by either Manufacturer or Dealer and any mobile home purchased by Dealer from Manufacturer and sold to a retail customer are still covered by Manufacturer's warranty, or have not yet been sold by Dealer to a retail customer, the obligations of Dealer and Manufacturer, as set forth above, shall continue with respect to all such mobile homes despite the termination of the manufacturer-dealer relationship.

(21) Failure by either party to fulfill the terms and conditions of this agreement shall be good and sufficient cause for termination by the other party of this agreement and of the manufacturer-dealer relationship.

(22) Manufacturer will not assume financial responsibility for performance of any repairs referred to in Paragraph (17), unless prior authorization for such repairs shall have been given to Dealer.

(23) The retail customer (or Dealer, if the unit has not been sold) is encouraged to make direct contact with the manufacturer of any equipment, appliances, or component parts installed in the mobile home which are not manufactured by Manufacturer when problems develop with such equipment, appliances or component parts. If the matter is

not resolved in a reasonable time, the manufacturer's plant manufacturing the mobile home should be notified.

(24) No cash settlements shall be made by Manufacturer in lieu of repairs.

(25) This agreement supersedes all prior agreements, both written and oral, between the parties hereto with respect to the subject matter of this agreement. This instrument contains the entire agreement between the parties hereto with respect to the subject matter of this agreement, and shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and permitted assigns. This agreement may not be amended or supplemented orally but only by an agreement in writing which has been signed by the party against whom enforcement of any such amendment or supplement is sought.

(26) Time is of the essence of this agreement, and all provisions of this agreement relating to the time of performance of any obligation under this agreement shall be strictly construed.

APPENDIX F

FLEETWOOD ENTERPRISES, INC.
3125 MYERS STREET – P.O. BOX 7638, RIVERSIDE, CALIFORNIA 92503
TELEPHONE (714) 785–3500

(Date)

Dear Mobile Home Owner:

For more than 20 years, Fleetwood Enterprises, Inc. and its subsidiary companies have manufactured quality, low cost mobile homes. Our records indicate that you have recently purchased a home manufactured by one of our subsidiaries.

Your home is warranted to be free from defects in material and workmanship for one year from the date of original purchase. If a defect comes to your attention during this time period, the dealer who sold you the home should be contacted. In most cases, he will be able to correct the problem. If the dealer is unable to make the correction, he is required to notify the manufacturer who will then assist in resolving the matter.

In order for us to determine if you have been satisfied with your home, we request that you respond to the following questions (if you need more space, please attach a separate page):

(1) Have you experienced any problems with your home that you feel are covered by our warranty or arise from the improper setup or installation of your home?

(2) If so, whom did you notify of these defects or setup problems (if any) and when did notification occur?

(3) Were these problems satisfactorily resolved?

(4) Do you have any suggestions that would be useful to us in improving our product for future customers?

It would be greatly appreciated if you would respond to the above questions and return this letter in the enclosed postage paid envelope.

We thank you in advance for your help in this matter.

Sincerely,

FLEETWOOD ENTERPRISES, INC.

Manager of Consumer Affairs

Enclosure

IN THE MATTER OF

SKYLINE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2642. Complaint, Mar. 4, 1975 - Decision, Mar. 4, 1975

Consent order requiring an Elkhart, Ind., manufacturer of mobile homes, among other things to cease unfair and deceptive warranty practices through the establishment of a prompt and effective system to handle warranty-related problems. The order requires respondent to provide warranty repairs or services on still-unrepaired mobile homes manufactured between 1972 and 1974 and to provide future retail purchasers with relief by establishing and maintaining a regular and effective system to handle complaints and service. Under this system, all repairs must be complete within thirty days after notification to the respondent of defects. Where the defects affect safety or habitability of the mobile home, the repairs must be started within three business days and be expeditiously completed.

Appearances

For the Commission: *Walter E. Diercks, Pamela B. Stuart,* and *Robert N. Weinstock.*

For the respondents: *Julius Schelezinger* and *Charles Smith, Morgan Smith & Bockius,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Skyline Corporation, a corporation, and certain of its subsidiaries, (hereinafter referred to as respondents) have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint and the order attached hereto the term "mobile home" means a movable or portable dwelling over thirty two feet in body length and over eight feet in width, constructed to be towed on its own chassis and designed so as to be installed with or without a permanent foundation for human occupancy as a residence, which may include one or more components which can be retracted for towing purposes and subsequently expanded for additional capacity, or two or more units separately towable but designed to be joined into one integral unit. "Mobile home" as used herein includes the mobile home structure, including the plumbing, heating and electrical systems.

PAR. 2. Respondent Skyline Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 2520 Bypass Rd., Elkhart, Ind.

PAR. 3. Respondents are now and have been engaged in the design, manufacture, advertising, offering for sale, sale and distribution of mobile homes to selected mobile home dealers. Manufacturing is accomplished in approximately 33 facilities controlled and operated by respondents located throughout the continental United States. Respondent Skyline Corporation dominates, controls, condones, approves and derives pecuniary benefit from the conduct of its subsidiaries engaged along with it in the above described business.

PAR. 4. In the further course and conduct of their aforesaid business respondents are now and have been soliciting persons (individuals, partnerships and corporations) to become "authorized" dealers, and are also solicited by persons who desire to become "authorized" dealers. Respondents select certain of these persons as "authorized" dealers. In the normal course of business respondents sell and distribute the aforesaid homes only to these "authorized" dealers who then resell these products to the public. In the normal course of business the way in which the aforesaid homes are purchased new at retail unused by a first purchaser is through an "authorized" dealer.

PAR. 5. In the further course and conduct of their aforesaid business respondents place primary reliance on their "authorized" dealers to ascertain which of their aforesaid mobile homes contain defects which are subject to the aforesaid warranty, and to notify respondents of defects for which respondents assume responsibility. Respondents also place primary reliance on their "authorized" dealers to effect such repairs and services as are necessary to correct defects covered by the aforesaid warranty and to notify respondents of those defects covered by the aforesaid warranty which said dealers are unable or unwilling to fully correct, so that respondents may repair the aforesaid defects either directly with their own personnel or through the use of an independent service contractor.

PAR. 6. In the further course and conduct of their aforesaid business, respondents now cause and have caused, their mobile homes to be transported to "authorized" dealers located in various States of the United States and to be sold to retail purchasers by such dealers. Respondents therefore maintain and have maintained a substantial course of trade in said mobile homes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. In the further course and conduct of their aforesaid business respondents are now, and have been, orally or in writing, directly or through their dealers and others, granting or disseminating certain warranties or certain statements concerning their warranties to each retail purchaser of their aforesaid mobile homes by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act.

(a) Each written warranty disseminated by respondents prior to approximately Oct. 1972 in all States in which they did business, except California and prior to approximately May 1972 in California, represented directly or by implication that respondents would correct all defects in workmanship and materials of their mobile homes during the ninety (90) days subsequent to delivery to the retail purchaser, except for certain components therein enumerated, including but not limited to certain major applicances. Each written warranty disseminated by respondents since approximately October 1972 in all States in which they do business, except California, represents, directly or by implication, that respondents will repair any part of their mobile homes which fails because of a manufacturing defect within one year of delivery to the retail purchaser. Each written warranty disseminated by respondents in California since approximately May 1972 (certain changes not relevant hereto were made in approximately Oct. 1972) represents, directly or by implication that respondents will correct all substantial defects in material or workmanship of their mobile homes during the one year subsequent to delivery to the retail purchaser. Each written warranty disseminated by respondents prior to approximately Oct. 1972 in all states in which they did business, except California, further represented, directly or by implication, that respondents' obligation under said warranty was limited to repairing or replacing parts of their mobile home which were returned to their factory with transportation charges prepaid and which respondents determined to be defective.

Respondents' written warranty disseminated prior to approximately Oct. 1972 in all states in which they did business, except California and prior to approximately May, 1972 in California, and their warranty disseminated in California between approximately May and Oct. 1972 further purported to disclaim all other warranty rights which are imposed by force of law, including but not limited to the implied warranties of merchantability and fitness for a particular purpose and represented directly or by implication that the aforesaid written warranties set forth the full extent of respondents' warranty obligations.

(b) Notwithstanding the foregoing, it is and has been respondents' uniformly applied warranty policy that the aforesaid service and repair of defects covered by the written warranty will be provided at the mobile home site and that the return of the home, or the defective parts, as the case may be, with transportation charges prepaid is not a condition precedent to such performance.

PAR. 8. In the further course and conduct of their aforesaid business respondents have engaged in acts and practices which result in, and have resulted in, the failure to maintain an adequate, regular and effective system which assures that every retail purchaser of respondents' mobile homes in fact receives full service and repair of defects covered by the aforesaid warranty within a reasonable time.

Typical, but not inclusive of such acts and practices, are:

(a) The dissemination of a written warranty as described in Paragraph Seven which fails to disclose the true nature and extent of purchasers' warranty rights and those warranty obligations which respondents in fact undertake in the normal course of business, including but not limited to:

(1) the fact that pursuant to respondents' policies it is regarded as the "authorized" dealers' sole and complete responsibility, at least in the first instance, to perform repairs and service for certain classes of defects covered by the aforesaid warranty without compensation or reimbursement by respondents and without regular and effective action by respondents to determine whether such repairs and service are in fact fully performed within a reasonable time.

(2) the representations, made directly or by implication in respondents' written warranty disseminated prior to approximately Oct. 1972 in all states in which respondents did business except California and prior to approximately May, 1972 in California, and in respondents' written warranty disseminated in California between approximately May and Oct. 1972, that said warranties were the sole legal warranties, that they legally excluded and disclaimed all implied-in-law warranties, and that said warranties stated the sole legal remedy available to the purchaser, when in truth and in fact under the applicable law of several states in which respondents' homes were sold at retail such exclusions, disclaimers or limitations were unenforceable.

(3) the representation, made directly or by implication in respondents' written warranty disseminated prior to approximately Oct. 1972 in all states in which respondents did business except California and prior to approximately May, 1972 in California, that as a condition precedent to securing full performance by respondents of their warranty obligations every party to whom the warranty was offered must have properly completed and mailed to respondents a certain owner's registration card within five days after the initial delivery of

the mobile home to him or her, when in truth and in fact respondents' internal policy was to provide such performance irrespective of whether the card had been returned.

(4) the representation made directly or by implication in respondents' written warranty disseminated prior to approximately Oct. 1972 in all states in which respondents did business, except California and prior to approximately May, 1972 in California, that as a condition precedent to securing full performance by respondents of their warranty obligations every party to whom the warranty was offered must transport the defective part or if necessary the entire home to respondents' manufacturing plant, when in truth and in fact it was respondents' policy to provide such performance at the home site.

(b) the failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four are competent to perform warranty service or have made adequate arrangements for performing warranty service through independent contractors.

(c) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, notify respondents of the existence of claims initiated by retail purchasers for warranty service or for repair of defects covered by the aforesaid warranty.

(d) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, in fact fully perform and complete within a reasonable time all warranty service and repairs performed on behalf of respondents.

(e) the failure to establish and maintain an effective and regular mechanism for the prompt and fair resolution of mobile home consumer complaints and requests for service and repairs relating to respondents' warranty or warranty policies.

(f) the failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four, either directly or by action through independent contractors, are competent to perform a thorough inspection of a mobile home prior to its tender to a retail customer to determine whether a home contains defects covered by the aforesaid warranty.

(g) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, actually perform or assure the performance of a thorough inspection of a mobile home prior to its tender to a retail customer to determine whether a home contains defects covered by the aforesaid warranty.

(h) the failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four, either directly or by action through independent contractors, are competent to perform the installation or "setup" of the aforesaid mobile homes at the homesite selected by the retail purchaser.

(i) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, actually and competently perform the installation or "setup" of the aforesaid mobile homes.

(j) the failure to maintain an adequate and expert factory service capability or to make other provisions adequate to assure the full performance within a reasonable time of the repair of defects covered by the aforesaid warranty which respondents' "authorized" dealers are unwilling or unable to perform.

The aforesaid failure to maintain a regular and effective system which assures the full performance within a reasonable time of service and repair of defects covered by the aforesaid warranty has the capacity or tendency to impede, delay or prevent the performance of said service and repairs for parties to whom the warranty is offered.

PAR. 9. By and through the aforesaid acts and practices respondents have been and are now:

(a) Disseminating a warranty which fails to fully and completely inform purchasers as to the actual protection offered by respondents.

(b) Failing to establish or maintain an effective or adequate system which assures that respondents will fully correct or repair all defects covered by the aforesaid warranty within a reasonable time.

The aforesaid acts and practices are deceptive and are in violation of Section 5 of the Federal Trade Commission Act.

PAR. 10. By such failure to maintain a regular and effective system which assures that every party to whom the warranty is provided will receive full performance within a reasonable time of the service and repair of defects covered by the aforesaid warranty respondents have been and now are engaged in unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 11. Through the individual and cumulative acts and practices set forth in Paragraph 8(a) respondents are now and have been disseminating and causing the dissemination of a written warranty which fails to fully and accurately describe the true nature and extent of the warranty rights of retail purchasers of respondents' mobile homes and those warranty obligations which in fact respondents undertake in the normal course of business. Thus respondents have failed to disclose material facts which if known to consumers:

(a) would be likely to affect their decision of whether to purchase one of respondents' mobile homes, and

(b) would enable retail purchasers to understand the true nature and extent of their warranty rights and to secure performance of such warranty service.

Therefore, the aforesaid failures to disclose material facts are deceptive and unfair and are in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Skyline Corporation, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana with its office and principal place of business located at 2520 By-pass Rd., Elkhart, Ind.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

1. *It is ordered*, That respondents shall within 90 days from the effective date of this order make a written inquiry of all known retail purchasers of respondents' mobile homes (except those specifically excluded below) built between July 1, 1972 and June 30, 1974, utilizing the form of letter shown in Appendix A attached hereto and made a part hereof which shall contain therein a self-addressed postage paid return envelope, and which shall be mailed to such purchasers by first class mail.

Known retail purchasers are defined as those first purchasers at retail of said mobile homes who communicate with respondents no later than 60 days after the effective date of this order and those first retail purchasers whose names and addresses: (1) are contained in company tire records and warranty card files; (2) are supplied by the Federal Trade Commission within 60 days of the effective date of this order or (3) are supplied to respondents by respondents' past and current dealers in response to respondents' letter request for such information sent by first class mail, (which letters shall be sent no later than 30 days after the effective date of this order) utilizing the form of letter shown in Appendix B attached hereto and made a part hereof and which shall contain therein a self-addressed postage paid return envelope.

Notwithstanding the above, known retail purchasers shall not include:

(a) local, State or Federal Governments or agencies thereof.

(b) retail purchasers who are now or have been engaged in litigation with respondents involving their mobile homes built by respondents during the two year period set forth hereinabove.

(c) retail purchasers whose homes were sold to them on an "as is" basis.

(d) retail purchasers who communicated directly with respondents' corporate headquarters or their attorneys concerning a problem or defect in such purchaser's mobile home, where there is a record indicating a resolution of the problem to the purchaser's satisfaction.

(e) retail purchasers whose names are supplied by past or current dealers in response to respondents' written inquiries to dealers as required above when such names are received by respondents from a dealer more than sixty days after respondents' inquiry was mailed to that dealer unless the purchaser or purchasers themselves communicate with respondents no later than 60 days after the effective date of this order, or unless the name or names of such purchaser or purchasers appear in respondents' warranty card files, or tire records or were supplied to respondents by the Federal Trade Commission as set forth hereinabove.

(f) retail purchasers who live outside the United States or who purchased units from dealers located outside the United States.

(g) first retail purchasers who are known to respondents to no longer own their mobile homes built by respondents.

2. *It is further ordered,* That respondents shall, directly or through their dealers or other third parties repair or service within a reasonable time at the site of the home (in the normal course not to exceed ninety days from the date on which the letter to a given retail purchaser referred to in order Paragraph 1 is returned and received by respondents) all defects and malfunctions in mobile homes produced by respondents during the two year period referred to hereinabove which became known pursuant to order Paragraph 1 unless it is clear that a given defect or malfunction:

(a) is a result of improper setup of the mobile home.

(b) is a result of improper use or abuse of the mobile home.

(c) did not arise or become evident within the term of the warranty.

(d) was brought to respondents' attention by a retail purchaser more than sixty days after respondents mailed the written inquiry to such purchaser as provided hereinabove where the home was purchased by the first retail purchaser more than one year prior to the effective date of this order.

(e) is a minor cosmetic defect in a home purchased by the first retail purchaser more than one year prior to the effective date of this order.

3. *It is further ordered,* That respondents cease and desist from disseminating, or causing the dissemination of, offering or otherwise providing, in commerce, any express warranties to the retail purchasers of respondents' mobile homes unless respondents meet all of their obligations under such warranties within the time period standards set forth hereinbelow in order Paragraph 3(f) and establish and maintain a regular and effective system which is reasonably designed to assure that every purchaser of the aforesaid mobile homes will receive full performance by respondents, directly or by action through their dealers or other third parties, of all such warranty obligations within the said time period standards. This warranty performance system shall incorporate but not necessarily be limited to the following standards and terms:

(a) Respondents shall, beginning within 120 days of the effective date of this order, delegate the administration of and supervision over the operation of those aspects of respondents' warranty service program described in order Paragraphs 1, 2, and 3(b), 3(h), 3(k), 3(l) below to the Skyline Director of Consumer Services, who shall have no direct responsibilities for the sale or marketing of respondents' mobile homes and who shall report to a vice-president of the corporation. The Director of Consumer Services shall be responsible for developing, implementing and supervising warranty service record keeping and followups, and he shall make analyses of service experience including the manner in which respondents' employees, dealers and independent contractors are carrying out warranty and setup responsibilities, and policy recommendations. The Director of Consumer Services shall in addition supervise the operation of the dispute settlement mechanism required under order Paragraph 3(n) below and shall make periodic reports as set forth in order Paragraph 3(m) at least on a monthly basis to respondents' responsible officers.

(b) Respondents shall disseminate a warranty and associated documents which clearly and fully describe and effectively communicate to the first retail purchaser:

(1) the identity and address of the warrantor;

(2) the nature and extent of the warranty offered or otherwise provided;

(3) the remedies available to the purchaser under the warranty;

(4) the manner in which respondents intend to provide for performance of warranty obligations, including disclosure of any delegation of warranty responsibilities to third parties; *Provided, however*, That disclosure of said delegation must be accompanied by additional disclosure that such delegation in no way relieves respondents of the ultimate responsibility to fulfill all warranty obligations;

(5) any and all requirements which must in fact be fulfilled by the purchaser as a condition precedent to securing performance by respondents of their warranty obligations;

(6) a uniform procedure to be followed by purchasers in order to request performance by respondents of their warranty obligations;

(7) a uniform procedure available to the purchaser for the systematic review and disposition of complaints and disputes with respect to the performance of respondents' warranty obligations by respondents' manufacturing plants, subsidiaries, divisions, and employees, or by respondents' dealers or other third parties. This procedure shall consist of a statement that all complaints addressed to the Director of Consumer Services will receive evaluation and response within five business days after receipt, and that in the event of disagreement between the retail purchaser and respondents' manufacturing plants, subsidiaries, divisions, employees or respondents' dealers or other third parties, the Director of Consumer Services will mediate the dispute, or a similar statement to the same effect.

(c) Respondents shall cease and desist from selling their mobile homes without any express or implied warranty, *i.e.*, "as is," or with any disclaimer of implied warranties or limitations or exclusion of liability under any warranty or disseminating or causing the dissemination of any statement or representation which represents directly or by implication, that respondents have disclaimed any express or implied warranty or limited or excluded any liability under any warranty unless respondents have a reasonable basis, in the form of an opinion by legal counsel that said disclaimers, limitations and exclusions are enforceable under governing state law, and clear and conspicuous notice of said "as is" sale or other said disclaimer, limitation or exclusion is given to prospective retail purchasers of their mobile homes prior to the execution of the contract of retail purchase. A clear and conspicuous notice of an "as is" sale shall contain the following language:

NOTICE

The manufacturer of this mobile home sells it "as is" and refuses to assume any responsibility for defects. The purchaser of this mobile home must accept it with all defects and take the entire risk, under contract law, as to its condition.

Provided, however, That with respect to: (a) the "as is" sale of damaged, salvaged, demonstrator or repossessed mobile homes, (b) the sale of mobile homes where respondents disclaim or fail to grant an express warranty on appliances which are covered by a separate written warranty by a supplier or manufacturer other than respondents, and (c) the "as is" sale of mobile homes to local, state and federal governments or agencies thereof, the aforesaid opinion by legal counsel shall not be required.

(d) All warranty service and repair obligations performed subsequent to the tender of the home to the retail purchaser shall be rendered by respondents, directly or through their dealers or other third parties at the site of the mobile home.

(e) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealers or any other persons not employees of respondents to:

(i) determine whether any mobile home manufactured by respondents contains defects which are within the scope of a warranty extended by respondents or otherwise requires remedial action pursuant to said warranty;

(ii) notify respondents of the existence of those circumstances enumerated in subparagraph (e)(i) above; or

(iii) perform any repairs or otherwise provide service in satisfaction of any warranty obligations of respondents,

respondents, beginning within 120 days of the effective date of this order, shall assure that if a dispute or disagreement should arise between respondents and one or more of said dealers as to which of them is to incur any such responsibility with respect to warranty repairs and service or is to correct a malfunction related or alleged to relate to improper setup, any repairs or other corrective action will be expeditiously provided (in the normal course of business) in a manner consistent with this order, regardless of whether the said dispute or disagreement has been resolved.

The "normal course of business" does not include:

(1) conditions under which abnormal demands are made upon service capabilities as the result of natural disasters, other acts of God or the government (including the effects of remedial action required of respondents as set forth in order Paragraphs 1 and 2), or any other event beyond the control of respondents and their dealers which places an unusually large demand upon service facilities;

(2) conditions resulting from disasters, strikes, acts of the government, instances of force majeure or other occurrences which are beyond the control of respondents and their dealers which prevent respondents and their dealers from responding to service requests within the time periods stated hereinbelow;

(3) slight omissions or deviations from the terms of this order which are inadvertent, unintentional and not due to the bad faith of respondents.

(f)(1) Respondents shall, beginning within 120 days of the effective date of this order, directly or through their dealers or other third parties commence, in the normal course of business, as set forth in order Paragraph 3(e) above, all warranty services or repairs of defects giving rise to a condition which affects the safety of a mobile home or renders it substantially uninhabitable, as soon as possible but in no event later than three business days following receipt of notice of such defect by respondents from the retail purchaser, or within two business days following receipt of notice of the determination made by respondents' dealer pursuant to Paragraph 3(j)(3)(iii)(a) below, and shall complete such service or repairs expeditiously.

(2) Respondents shall, except as set forth in subparagraph (f)(1) above, beginning within 120 days of the effective date of this order, directly or through their dealers or other third parties, in the normal course of business, as set forth in order Paragraph 3(e) above: (a) respond to notice of the need for warranty service or repairs within a reasonable time not to exceed seven business days of receipt of said notice by respondents or their dealers and (b) complete said service or repairs within a reasonable time not to exceed thirty days following said receipt of notice.

(3) *Provided, however,* That in the event of a bona fide dispute

between respondents or their dealers and a retail purchaser requiring a determination of the Director of Consumer Services whether or not the defect(s) complained of by the retail purchaser are or are not covered by respondents' warranty, then: In the event it is determined that warranty service or repair is required, which determination shall be made promptly, respondents shall be given, from the date on which the notice of the dispute is received by the Director of Consumer Services, no more than three business days in the case of defects covered by subparagraph (f)(1) above to commence service or repair (such repairs to be completed expeditiously), and no more than thirty days in the case of defects covered by subparagraph (f) (2) above to complete service or repair.

(g) Respondents shall, except as provided in Paragraph 3(i) of this order, in the normal course of business as set forth in order Paragraph 3(e) above, beginning within 120 days of the effective date of this order, inspect at the home site, directly or through their dealers or other third parties, each mobile home prior to or at the time of tender of possession to the retail purchaser to assure that the home is being delivered to such retail purchaser free of all ascertainable defects and is properly set up, except for deficiencies which do not affect the home's safety or habitability, which shall be noted in the owner-dealer final delivery checklist (Appendix C), and which shall then be remedied in accordance with subparagraph (f)(2) above.

(h) Respondents shall, except as provided in Paragraph 3(i) of this order, in the normal course of business as set forth in order Paragraph 3(e) above, beginning within 120 days of the effective date of this order, reinspect, directly or by action through their dealers or other third parties, each mobile home between thirty and ninety days after tender of possession to the retail purchaser to determine the existence of and to correct or arrange for the correction of any defects covered by respondents' warranty in the mobile home, or improper setup and problems arising therefrom.

Results of each of the inspections required in order Paragraphs 3(g) and 3(h) hereinabove will be documented in a report or reports which shall be signed by respondents' dealer and, if possible, by the retail purchaser or said purchaser's representative, indicating agreement with the information set forth therein. The reports documenting the results of the aforesaid inspections may be in the formats set out in Appendices C and D attached hereto or in formats substantially equivalent thereto.

(i) If the retail purchaser elects to provide for the setup of his mobile home himself, then in such cases the responsibility of respondents and their dealers for transportation, setup, inspection and reinspection, as set forth in subparagraphs (g) and (h) above, shall terminate with the delivery or tender of possession to the retail purchaser or his agent or representative.

(j) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealers to perform the obligations set forth in order Paragraph 3(e) above, respondents shall enter into written contractual agreements with such dealers which:

(1) adequately and accurately describe the scope of those duties, burdens and responsibilities to be borne by said dealers as aforesaid, as well as the responsibility for properly setting up respondents' mobile homes;

(2) establish the duty of the dealer to provide respondents in the normal course of business as set forth in this order Paragraph 3(j) with the name and address of each retail purchaser of respondents' mobile homes and the date of each such purchase;

(3)(i) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(j) to commence all warranty service, or repair of defects, giving rise to a condition which affects the safety of a mobile home or renders it substantially uninhabitable as soon as possible but in no event later than three business days following receipt of notice of such defect or condition by such dealer and to complete such service or repairs expeditiously;

(ii) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(j) to complete all other warranty service or repairs within a reasonable time, not to exceed thirty days following receipt of notice of such condition by such dealer;

(iii) *provided*, That the requirements of subparagraphs (j)(3)(i) and (j)(3)(ii) above shall apply only to those cases in which the dealer responds to and completes the service or repairs himself. In those cases in which the dealer determines to rely upon respondents to perform or to complete service or repairs requested by retail purchasers, such determination shall be made and communicated to respondents as soon as possible but in no event later than:

(a) two business days in the case of service or repairs provided for in subparagraph (j)(3)(i) above, or

(b) five business days in the case of service or repairs provided for in subparagraph (j)(3)(ii) above,

after receipt of notice by the dealer from the retail purchaser.

(4) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(j) to inspect each mobile home prior to or at the time of tender of possession to the retail purchaser as set forth in Order Paragraph 3(g) to assure that the home is being delivered to such purchaser or his agent or representative free of

defects and is properly setup (except as provided in Paragraph 3(i) above), except for deficiencies which do not affect the home's safety or habitability, which shall be noted in the owner-dealer final delivery checklist (Appendix C) and which shall then be remedied in accordance with subparagraph (j)(3)(ii) above;

(5) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(j) to reinspect each mobile home between thirty and ninety days after tender of possession to the retail purchaser as set forth in order Paragraph 3(h) to determine the existence of and to correct or arrange for the correction of any defects covered by respondents' warranty in the mobile home, or improper setup and problems arising therefrom (except as provided in Paragraph 3(i) above);

(6) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(j) to provide respondents with reports which will document the results of the inspections set forth in (4) and (5) immediately above and which will be signed by respondents' dealer and, if possible, by the retail purchaser or said retail purchaser's representative indicating agreement with the information set forth therein;

(7) provide for a procedure which assures that if a dispute or disagreement should arise between respondents and one or more of said dealers as to which of them is to perform warranty service or repairs or is to correct an improper setup or a malfunction resulting therefrom, any and all repairs or other corrective action required thereby will be expeditiously provided, regardless of whether the said dispute or disagreement has been resolved;

(8) establish the duty of the dealer to maintain or contract for adequate service personnel and facilities;

(9) set forth service responsibilities in the event of termination of a dealer with respect to homes still under warranty or in the possession of the dealer and not yet sold to a retail purchaser at the time of termination;

(10) set forth the right of respondents to withdraw authorization from dealers failing to meet their responsibilities under such agreement.

The normal course of business for purposes of this order Paragraph 3(j) does not include:

(a) conditions under which abnormal demands are made upon service capabilities as the result of natural disasters, other acts of God or the government, or any other event beyond the control of the dealer which places an unusually large demand upon service facilities;

(b) conditions resulting from disasters, strikes, acts of the government, instances of force majeure or other occurrences which are beyond the control of the dealer which prevent the dealer from responding to service requests within the time periods stated hereinbelow;

(c) slight omissions or deviations from the terms of this order which are inadvertent, unintentional and not due to the bad faith of the dealer.

Existing dealers authorized by respondents as of the effective date of this order shall execute such agreements (which agreements shall be immediately effective) within 180 days of the effective date of this order, or shall be terminated by respondents. Other dealers authorized by respondents later than the the effective date of this order shall execute such agreements at the time of their authorization.

Such agreement shall be in the format set forth in Appendix E attached hereto or in a format substantially equivalent thereto.

(k) Respondents shall send a questionnaire (using the format set forth in Appendix F attached hereto or in a format substantially equivalent thereto) to all persons other than "as is" purchasers who after the effective date of this order purchase at retail respondents' mobile homes which inquires as to

(1) the existence of any defects in said mobile homes covered by respondents' warranty or of an improper setup or problems resulting therefrom;

(2) whether the retail purchaser notified anyone of such defects or setup problems and if so, who and when;

(3) the identity of any person who sought to service such defects or setup problems;

(4) whether such defects or setup problems were fully repaired, the period of time required to effect such repairs, and the identity of the parties who accomplished such repairs;

(5) whether the retail purchaser is satisfied with the promptness and quality of the repair.

Such questionnaire in the form of a postage paid self-addressed card or letter containing a postage paid self-addressed envelope, shall be sent between one hundred and one hundred and twenty days subsequent to the tender of possession of the home to the retail purchaser.

(l) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealer or any other persons not employees of respondents to perform any of the responsibilities or duties set forth in Paragraph 3(e) hereinabove, respondents shall fully evaluate the level of expertise and physical and personnel resources of such dealers or other persons with respect to the ability to inspect, repair, service or set up mobile homes manufactured by respondents prior to such delegation or reliance to assure that all said persons are capable of performing said responsibilities, or have provided for such performance through a third party having such capability, in accordance with the standards set forth herein.

Respondents shall in addition regularly review and evaluate the manner in which such persons, directly or through another third party, perform the aforesaid responsibilities and maintain their service capabilities and shall withdraw said reliance and authorization from persons failing directly or through a third party to meet those responsibilities or the standards set forth herein.

(m) The Director of Consumer Services shall, beginning within 120 days of the effective date of this order, make periodic reports at least on a monthly basis to respondents' responsible officers which shall include current information concerning:

(1) the current cost to respondents of warranty service

(2) the incidence and nature of frequently recurring defects

(3) those measures undertaken in response to reports of frequently recurring defects including but not limited to modification in production and design of respondents' mobile homes

(4) the manner in which respondents' employees, and dealers and other third parties are performing warranty and setup responsibilities.

(n) Respondents shall, beginning within 120 days of the effective date of this order, establish a uniform procedure for the systematic receipt and analysis and fair disposition of all complaints or disputes which may arise between the aforesaid retail purchasers of respondents' mobile homes and respondents or respondents' dealers or other third parties regarding any alleged warranty obligation of respondents.

Such procedure, which shall be supervised by the Director of Consumer Services, shall incorporate but not necessarily be limited to:

(1) prompt evaluation and response by respondents to all complaints within a reasonable time not to exceed five business days after receipt by respondents;

(2) the designation of a single focal point, such as the Director of Consumer Services, within the Corporation for the receipt of consumer complaints regarding warranty repairs and setup problems;

(3) fair and impartial mediation of such disputes by corporate level personnel not responsible for sales, such as the Director of Consumer Services;

(4) an accurate and complete record keeping system regarding the nature and disposition of all such disputes and complaints received by respondents;

(5) periodic review and evaluation by respondents of the effective-

ness of such procedures and correction of such procedures where necessary.

(o) Respondents shall, beginning within 120 days of the effective date of this order, maintain full and adequate records which disclose:

(1) the date of receipt, disposition and the date of disposition of each request for warranty service (including any refusal to accept a request and the reason for such refusal) received by respondents, and

(2) the results of evaluations of service capacity provided for in Paragraph 3(l) of this order.

4. *It is further ordered*, That respondents shall forthwith distribute a copy of this order to each of their operating divisions engaged in the manufacture, offering for sale, sale and distribution of mobile homes.

5. *It is further ordered*, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in the corporation which may affect compliance obligations arising out of this order.

6. *It is further ordered*, That respondents shall, at intervals of 9, 18, and 24 months following the effective date of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order. Such reports shall include but not be limited to the periodic reports submitted to respondents' responsible officers described in this order Paragraph 3(l) above.

7. *It is further ordered*, That respondents shall furnish to the Commission nine months after the effective date of this order a report which discloses the dates and manner in which dealers and retail purchasers were contacted pursuant to the procedures described in order Paragraph 1 above, and the dates and manner in which dealers and retail purchasers acted in response thereto and the dates and manner in which respondents acted in response to allegations by retail purchasers which purported to create an obligation on the part of respondents under the terms of order Paragraph 2 above. Respondents shall for a period of two years after the effective date of this order, maintain records which are adequate to disclose respondents' compliance with order Paragraphs 1 and 2, in order that such records may be furnished by respondents to the Federal Trade Commission upon request.

8. *It is further ordered*, That respondents shall submit to the Federal Trade Commission for its review copies of any proposed substantial revisions in the questionnaire required pursuant to order Paragraph 3(k), the dealer agreement required pursuant to order

Paragraph 3(j), and the warranty documents described in order Paragraph 3(b) above, at least 60 days prior to the proposed effective date of any such revisions. Such submissions will be required for the three years following the effective date of this order.

APPENDIX A

(Date)

Dear Mobile Home Owner:

Thank you for purchasing one of Skyline Corporation's family of mobile homes. Our homes are warranted to be free from defects in material and workmanship. Any repairs required by your warranty should have been performed in full by the dealer who sold you your home or, if this was not possible, by the factory which manufactured it. Through the following questionnaire, we are seeking to determine your experience with regard to service so that we may be sure you have received full performance of warranty obligations. If you have not received such full performance, your response to the following questions will enable us to provide you with the warranty service to which you are entitled.

Please respond to the following questions and return this letter in the enclosed postage-paid envelope.

(1)(a) Have you experienced problems with your mobile home that you feel are covered by our warranty described above (check one) _____ yes _____ no

(1)(b) If the answer to (1)(a) is yes, please tell us *when* the problems occurred and *describe* them:

(2) If you have experienced problems that you feel are covered by our warranty, please advise us of *whom* you contacted and *when* the contact was made. ________________

(3)(a) If you contacted someone regarding a warranty problem, was the problem corrected (check one): _____ yes _____ no

(3)(b) If the answer to 3(a) was yes, please indicate *how long* it took to correct the problem and *who* performed the repair: ________________

3(c) If the answer to 3(a) was No, does the problem still exist (check one) _____ yes _____ no

3(d) If the answer to 3(c) was Yes, please describe the current condition of the problem and any attempts at correction you have made: ________________

4(a) If warranty service was provided, were satisfied with: (1) the promptness of repairs (check one) _____ yes _____ no (2) the quality and completeness of repairs (check one) _____ yes _____ no

4(b) If your answer to 4(a)(2) was No, does the problem which was the subject of warranty service still exist (check one) _____ yes _____ no

4(c) If your answer to 4(b) was yes, please explain and describe the current condition of the problem and any attempts at correction you have made: ________________

5(a) Who performed the set-up or installation of your mobile home? *(Name)* *(relationship, dealer, park operator, independent contractor, etc.)* *(location)*

5(b) Has there been any doubt or dispute: as to whether a problem you have experienced with your mobile home was a problem covered by your warranty or due to improper set-up or installation (check one) _____ yes _____ no

5(c) If the answer to 5(b) was Yes, does the problem still exist (check one): _____ yes _____ no

5(d) If the answer to 5(c) was Yes, please describe the current condition of the problem and any attempts you have made to get the problem corrected: ________________

5(e) Are you satisfied with the manner in which your mobile home was set-up or installed (check one) _____ yes _____ no

(6) Please advise us of any suggestions that you might have that will enable us to increase the quality, utility, and value that we strive to build into our homes.

____

Note: This questionnaire was mailed to you as your name and address appear in our records. If there is need for a correction, please make it in the space provided. Also we ask that you supply us with your telephone number in the space provided as it will facilitate our reaching you to discuss any problems with our product or service that you have pointed out:

(Name of Customer) ________________
(Street address) ________________
(City, State, Zip) ________________
Telephone Number (including area code) ________________

We thank you for responding to the questions set forth above. Please return this letter to us in the enclosed postage paid envelope.

Sincerely,

APPENDIX B

Letter to Dealer Requesting Names and Addresses of Past Purchasers

Dear ______________________:

Pursuant to an agreement with the Federal Trade Commission, Skyline Corporation is securing from each of its present and former dealers all names and addresses of retail purchasers of its mobile homes built between July 1, 1972 and June 30, 1974, beginning with Serial Numbers through Dealer submission of these names and addresses is necessary since warranty registration cards fail to provide the information for a substantial number of homes.

Please fill in the names and addresses of the retail purchasers of these units and serial numbers of the homes and return this letter in the postage-paid envelope provided, before , 1974, as called for by the above agreement.

Signed ______________________________,
Division Manager

Serial Numbers	Names and Addresses

APPENDIX C

Owner-Dealer Final Delivery Checklist

Owner:	**Dealer:**
______________________________	______________________________
(Name)	**(Name)**
______________________________	______________________________
(Address) (Phone No.)	**(Address) (Phone No.)**
______________________________	______________________________
(City) (State) (Zip)	**(City) (State) (Zip)**

Model and Serial Number ______________________________

The dealer has completed inspection of the home with the owner. The following items have been checked in accordance with the manufacturer's Field Installation Manual and found satisfactory:

Setup

Blocked and leveled. ______________

(Doublewides only) Halves aligned and exterior and floor covering installation completed. ______________

Anchors and tie-downs installed in accordance with local requirements. ______________

Utilities

The following have been connected:

Fuel (gas or oil) ______________

Water supply ______________

Sewage ______________

Electric power supply ______________

Exterior

Proper operation of doors and windows, including screens or storms. ______________

Roof seams ______________

Siding and trim ______________

Interior

Ceilings ____________

Paneling ____________

Holdings ____________

Floor coverings ____________

Curtains and drapes ____________

Lamps and light fixtures ____________

Electrical receptacles, circuit breakers and light switches ____________

Interior doors ____________

Cabinets and drawers ____________

All plumbing fixtures ____________

Furniture ____________

Appliances

Furnace ____________

Water heater ____________

Range and oven ____________

Refrigerator ____________

Washer and dryer ____________

Garbage disposer ____________

Air conditioner ____________

The Manufacturer's Warranty, Owner's Manual, Field Installation Manual, all appliance manuals and all required keys have been delivered and explained to the owner.

Any adjustments or repairs remaining to be done (describe briefly) ____________

____

____

____

The above inspection has been completed to my satisfaction, except for the adjustments or repairs remaining to be done as noted above.

______________________________ **Date** ____________

Owner's signature

____

Signature of dealer's representative

APPENDIX D

Reinspection Report

Owner:	**Dealer:**
______________________	______________________
(Name)	**(Name)**
______________________	______________________
(Address) **(Phone No.)**	**(Address)** **(Phone No.)**
______________________	______________________
(City) **(State)** **(Zip)**	**(City)** **(State)** **(Zip)**

Model and Serial Number ______________________

The dealer has reinspected the above home within 30 to 90 days after original delivery. The following items were checked and any necessary repairs or corrections made:

Supporting piers __________
Leveling __________
Roof __________
Doors and windows __________
Plumbing __________
Heating and Air Conditioning __________
Electrical System __________
Appliances __________

Any adjustments or repairs remaining to be done ______________________

____

____

The above reinspection and any necessary adjustments or repairs (except as otherwise noted above) have been completed to my satisfaction.

______________________ **Date** __________
Owner's signature

APPENDIX E

______________________ ______________________ ______________________

(*"Dealer"*) (*"Manufacturer"*)

SERVICE AGREEMENT

THIS AGREEMENT is entered into between Dealer and Manufacturer on the date set forth below. Dealer wishes to act or continue to act as a retail dealer of mobile homes produced by Manufacturer ("Homes"), and Manufacturer wishes Dealer to perform service including service under Manufacturer's written warranty. Recognizing that satisfaction and good will of homeowners are of primary importance and can be best achieved by Dealer and Manufacturer providing prompt, efficient and courteous service, and in consideration of Manufacturer's sales to Dealer, Dealer's purchases from Manufacturer, and their agreements herein, the parties mutually agree:

1. *Manufacturer Inspection and Correction.* Before shipment to Dealer, Manufacturer shall inspect every Home and correct discovered manufacturing defects.

2. *Dealer Inspection.* Dealer shall thoroughly inspect each Home and promptly initiate repair of any discovered defect. "Dealer Inspection" shall consist of inspection of each Home at the following times:

a. immediately upon receipt from Manufacturer

b. immediately before delivery by Dealer to any retail purchaser of a Home ("Homeowner")

c. immediately after setup, utility connection and site servicing, *and*

d. between 30 and 90 days after setup, in conjunction with any necessary releveling.

3. *Dealer Setup and Service.*

a. Dealer shall employ or contract for setup and service personnel who, in Manufacturer's reasonable judgment, are competent to set up Homes, and to provide both Reimbursable Service and Non-Reimbursable Service as defined and specified below. Dealer shall promptly respond to all Homeowner requests for such service, and shall promptly complete all such service within Dealer's ability, subject to Manufacturer's authorization to perform any Reimbursable Service.

b. Dealer agrees that setup of each Home shall be performed according to instructions contained in Manufacturer's Field Installation Manual, and any applicable federal, state or local statutes, ordinances, codes or regulations. Setup of each Home (including releveling and resolution of any problem resulting from improper setup) is Dealer's responsibility regardless of who does the setup.

c. Dealer shall perform Non-Reimbursable Service at Dealer's sole cost and expense, which shall include the examples of minor repairs and adjustments listed on the Attachment to this Agreement.

4. *Manufacturer Reimbursement.*

a. If Dealer reasonably believes that a Homeowner service request requires Reimbursable Service, Dealer shall request approval of and reimbursement by Manufacturer in accordance with Manufacturer's Homeowner Service Program Manual. Absent such authorization, Dealer shall not be entitled to reimbursement for service. Dealer will be entitled to reimbursement only for the amount authorized by Manufacturer.

b. "Reimbursable Service" means service to correct a defect existing at the time a Home is delivered by Manufacturer to Dealer. Reimbursable Service includes the examples listed in the Attachment to this Agreement. Service to correct any other defect, including any related to or resulting from delivery to the Homesite, setup, and any service necessary to correct any reasonably discoverable defect not noted in writing on a

Check Out Sheet to be signed by Dealer when the Home is delivered to Dealer, is Non-Reimbursable Service.

5. *Completion of Service.* Except as provided in paragraphs 6 and 7 below, Dealer shall in the normal course of business begin and complete all Reimbursable and Non-Reimbursable Service within a reasonable time but not later than thirty days after Dealer receives notice of the need for such service. But if Dealer or Manufacturer determines that a defect affects the safety of a Home or renders it substantially uninhabitable, Dealer shall in the normal course of business begin Non-Reimbursable and/or Reimbursable Service within three business days after receipt of notice of the need for such service, and shall quickly complete such service. "In the normal course of business" does not include (a) a condition under which abnormal demands are made upon service capabilities as a result of a natural disaster, other Act of God, or the government or any other event beyond the control of Dealer that places an unusually large demand upon service facilities or (b) an event such as a disaster, strike, act of government, or any other occurrence beyond the control of Dealer that prevents Dealer from responding to a service request within the times stated above.

6. *Manufacturer Service.* If any request appears to require Reimbursable or Non-Reimbursable Service beyond Dealer's ability, Dealer shall immediately examine the Home and inform Manufacturer by telephone no later than five business days after receipt of the service request. Manufacturer shall, if it agrees with Dealer's determination, promptly process such service request as if received directly from the Homeowner, and shall arrange for service to be performed within the time periods set forth in paragraph 5 above. However, if Dealer believes that a defect effects the safety of a Home or renders it substantially uninhabitable, and that repairs are beyond Dealer's ability, Dealer shall tell Manufacturer within two business days after receipt of the Homeowner request, and Manufacturer shall begin any such service within two business days after being informed by the Dealer.

7. *Service in Event of Dispute.* If Manufacturer and Dealer disagree as to whether Reimbursable or Non-Reimbursable Service is required, and if Dealer fails or refuses to correct a problem within a reasonable time but not longer than the time stated in paragraph 5 above, Manufacturer shall do so. Manufacturer shall disclose with Dealer which type of service was required, and Dealer shall promptly pay Manufacturer its reasonable cost of performing any Non-Reimbursable Service.

8. *Dealer/Homeowner Inspections.* Manufacturer shall provide Dealer with forms to be used by Dealer in performing the inspections required by paragraph 2 above. Dealer agrees:

a. diligently and timely

(i) to make such inspections,

(ii) to complete such forms, and

(iii) to note in writing on such forms any discovered manufacturing defect or remaining dealer responsibility item which shall be remedied as if Homeowner had notified Dealer of such defect or item;

b. promptly to send the originals of such forms to Manufacturer and to provide each Homeowner with copies of those required by paragraphs 2.c. and 2.d. above; and

c. whenever possible, to obtain the Homeowner's signature on such forms.

Dealer shall not knowingly deliver possession of a Home with any defect that affects the safety of a Home or renders it substantially uninhabitable.

9. *Retail Contract and Records.* Before execution of the retail sales contract, Dealer agrees to show to each Homeowner a copy of Manufacturer's warranty to be furnished with the Home. The Homeowner's copy of such warranty and any owner's manuals (including the Field Installation Manual), instructions and other materials that Manufacturer may furnish to Dealer for delivery to Homeowner shall be delivered to

Homeowner with possession of the Home. Dealer agrees to keep such records concerning Homeowners as Manufacturer may reasonably require and to furnish Manufacturer with information from such records. Dealer further agrees to provide to Manufacturer such information as Manufacturer may reasonably request concerning: (a) service requests from, complaints by, and other communications with Homeowners and (b) service activities with respect to Homes.

10. *Factory Training and Consultation.* Manufacturer agrees to provide training programs for Dealer service and setup personnel at such locations as Manufacturer may determine, without charge by Manufacturer. Manufacturer further agrees to consult with Dealer and to provide technical advice to Dealer concerning Home service and setup, if requested by Dealer.

11. *Termination.* If the Dealer/Manufacturer relationship is terminated, their obligations under this Agreement to inspect and service sold and unsold Homes shall continue and be unaffected by such termination. Dealer's obligations under this Agreement to furnish information, records and forms shall survive any such termination.

12. *Effect and Formalities.* Failure by either party to perform its obligations under this Agreement shall be good and sufficient cause for the other to terminate this Agreement and the Dealer/Manufacturer relationship. If any Agreement provision is declared legally invalid or unenforceable, the remaining provisions shall continue to be enforceable. More than one copy of this Agreement may be executed, each of which shall be deemed an original for all purposes. The paragraph headings herein are for convenience only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement, except capitalized and quoted words defined for purposes of this Agreement. This Agreement supersedes any prior agreement, either written or oral, between the parties as to service. It shall be binding upon and benefit the parties and their heirs, legal representatives, successors and assigns; but it may be assigned or otherwise amended or supplemented only in writing. *Time is of the essence of this Agreement,* and provisions relating to time of performance may be strictly construed.

IN WITNESS WHEREOF, Manufacturer and Dealer have executed this Agreement effective ______, 19______ Address of Dealer for notices:

________________________ ________________________

(Type or print name of signer)

By: ____________

Address of Manufacturer for notices: for the Dealer (Title)

________________________ ________________________

(Type or print name of signer)

____

By:for the Manufacturer (Title)

ATTACHMENT TO SERVICE AGREEMENT

Examples of Non-Reimbursable Service

A. Setting up all unassembled furniture, including but not limited to dinettes and bed frames.

B. Installing all light shades shipped loose.

C. Mounting or assembling all parts of the mobile home that are shipped loose as Manufacturer's normal procedure.

D. Making minor repairs to plumbing, electrical and gas systems.

E. Recaulking and resealing any roof seam or opening if necessitated by Dealer transportation or setup.

F. Recaulking all windows and doors if necessary to reduce leaks or drafts.

G. Making minor appliance adjustments and repairs.

H. Adjusting all doors, windows and drawers for proper operation.

I. Retacking any moldings that have come loose in transit or during setup.

J. Tightening wheel lug bolts before unit is delivered.

K. Making all repairs necessitated by delivery to Homeowner or improper setup.

L. Making routine cosmetic and other minor repairs.

M. Adjusting or replacing door locks and window cranks.

N. Fixing gas and water line leaks.

O. Tightening loose fittings.

Examples of Reimbursable Service

A. Making repairs necessary to correct manufacturing code deviations existing at the time of delivery to the Dealer.

B. Replacing defective materials; e.g., delaminated or discolored wall paneling or ceiling panels, if due to factory defect.

C. Making major interior repairs due to leaks if caused by faulty manufacture.

D. Repairing damages caused by frame failure if due to improper manufacture and not road damage or other causes for which Manufacturer is not responsible.

E. Replacing defective equipment (e.g., light switches, tires, kitchen sinks) existing at the time of delivery to Dealer.

F. Making repairs to exterior metal damaged prior to delivery to Dealer.

G. Replacing paneling and floor coverings damaged by water leaks if caused by faulty manufacture and not improper setup or other causes.

H. Replacing and rehanging excessively warped doors, if due to factory defect.

I. Repairing and replacing floor covering damaged at the factory.

APPENDIX F

Follow-up Questionnaire to Retail Purchaser

Dear Homeowner:

We appreciate your purchase of a mobile home built by Skyline. We sincerely believe you have chosen one of the very best values available in housing today.

Nothing is more important to us than your total satisfaction with your home, including the setup and services provided by your dealer. Would you kindly take a few minutes to complete and return this questionnaire? It will help us and your dealer to serve you better.

Dealer's Name: ________________
City: ________________
Approximate Date of Delivery: ________________

Was your home delivered in good condition and set up in a satisfactory manner? [ ] Yes [ ] No

Did you receive your Homeowner's Manual, Field Installation Manual, and manufacturer's warranty? [ ] Yes [ ] No

Did your dealer go through your home with you after setup and make sure everything was in good order? [ ] Yes [ ] No

IN THE MATTER OF

THE COMMODORE CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2643 Complaint, Mar. 4, 1975 - Decision, Mar. 4, 1975**

Consent order requiring an Omaha, Neb., manufacturer of mobile homes, among other things to cease unfair and deceptive warranty practices through the establishment of a prompt and effective system to handle warranty-related problems. The order requires respondent to provide warranty repairs or services on still-unrepaired mobile homes manufactured between 1972 and 1974 and to provide future retail purchasers with relief by establishing and maintaining a regular and effective system to handle complaints and service. Under this system, all repairs must be complete within thirty days after notification to the respondent of defects. Where the defects affect safety or habitability of the mobile home, the repairs must be started within three business days and be expeditiously completed.

Appearances

For the Commission: *Eric M. Rubin*, *Robert N. Weinstock*, *Walter E. Diercks* and *Pamela B. Stuart.*

For the respondents: *Howard Kaslow*, *Abraham, Kaslow & Cassman*, Omaha, Neb.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Commodore Corporation, a corporation, and certain of its subsidiaries, (hereinafter referred to as respondents) have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint and the order attached hereto the term "mobile home" means a movable or portable dwelling over thirty two feet in body length and over eight feet in width, constructed to be towed on its own chassis and designed so as to be installed with or without a permanent foundation for human occupancy as a residence, which may include one or more components which can be retracted for towing purposes and subsequently expanded for additional capacity, or two or more units separately towable but designed to be joined into one integral unit. "Mobile home" as used herein includes the mobile home structure, including the plumbing, heating and electrical systems.

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* Reported as amended by order issued Apr. 22, 1975.

PAR. 2. Respondent The Commodore Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 8712 W. Dodge Rd., Omaha, Neb.

PAR. 3. Respondents are now and have been engaged in the design, manufacture, advertising, offering for sale, sale and distribution of mobile homes to selected mobile home dealers. Manufacturing is accomplished in approximately five facilities controlled and operated by respondents, located in approximately four states. Respondent Commodore Corporation dominates, controls, condones, approves and derives pecuniary benefit from the conduct of its subsidiaries engaged along with it in the above described business.

PAR. 4. In the further course and conduct of their aforesaid business respondents are now and have been soliciting persons (individuals, partnerships and corporations) to become "authorized" dealers, and are also solicited by persons who desire to become "authorized" dealers. Respondents select certain of these persons as "authorized" dealers. In the normal course of business respondents sell and distribute the aforesaid homes only to these "authorized" dealers who then resell these products to the public. In the normal course of business the way in which the aforesaid homes are purchased new at retail unused by a first purchaser is through an "authorized" dealer.

PAR. 5. In the further course and conduct of their aforesaid business respondents place primary reliance on their "authorized" dealers to ascertain which of their aforesaid mobile homes contain defects which are subject to the aforesaid warranty, and to notify respondents of defects for which respondents assume responsibility. Respondents also place primary reliance on their "authorized" dealers to effect such repairs and services as are necessary to correct defects covered by the aforesaid warranty and to notify respondents of those defects covered by the aforesaid warranty which said dealers are unable or unwilling to fully correct, so that respondents may repair the aforesaid defects either directly with their own personnel or through the use of an independent service contractor.

PAR. 6. In the further course and conduct of their aforesaid business, respondents now cause and have caused, their mobile homes to be transported to "authorized" dealers located in various states of the United States and to be sold to retail purchasers by such dealers. Respondents therefore maintain and have maintained a substantial course of trade in said mobile homes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. In the further course and conduct of their aforesaid business respondents are now, and have been, orally or in writing, directly or through their dealers and others, granting or disseminating certain warranties or certain statements concerning their warranties to each retail purchaser of their aforesaid mobile homes by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act.

(a) Each written warranty disseminated by respondents in all states in which they do business except California represents, directly or by implication that respondents will correct for the original retail purchaser and any subsequent owner all defects in the workmanship or materials of each of the aforesaid new mobile homes during the twelve months subsequent to its purchase at retail except for certain specific components therein enumerated including but not limited to appliances. Said written warranty further represents that the aforesaid obligation is limited to repairing or replacing parts of their mobile homes which are returned to one of their factories and which respondents shall determine to have been defective. Each written warranty disseminated by respondents in California represents, directly or by implication that for each buyer of a new mobile home manufactured by respondents and sold to such buyers by a dealer licensed by the California Department of Motor Vehicles, respondents will correct at the site of the mobile home any substantial defect in the workmanship or materials of the aforesaid mobile homes during the one year and ten days subsequent to its delivery to the original buyer.

Respondents' written warranty disseminated in all States in which respondents do business except California further purports to disclaim all other warranty rights which are imposed by force of law, including but not limited to the implied warranties of merchantability and fitness for a particular purpose, and represents directly or by implication that the aforesaid warranty sets forth the full extent of respondents' warranty obligations.

(b) Notwithstanding the foregoing, it is respondents' uniformly applied warranty policy that the aforesaid service and repair of defects covered by the written warranty will be provided at the mobile home site and that the return of the home, or the defective parts, as the case may be, with transportation charges prepaid is not a condition precedent to such performance.

PAR. 8. In the further course and conduct of their aforesaid business respondents have engaged in acts and practices which result in, and have resulted in, the failure to maintain an adequate, regular and effective system which assures that every retail purchaser of respondents' mobile homes in fact receives full service and repair of defects covered by the aforesaid warranty within a reasonable time.

Typical, but not inclusive of such acts and practices, are:

(a) The dissemination of a written warranty as described in Paragraph Seven which fails to disclose the true nature and extent of purchasers' warranty rights and those warranty obligations which respondents in fact undertake in the normal course of business, including but not limited to:

(1) the fact that pursuant to respondents' policies it is regarded as the "authorized" dealers' sole and complete responsibility, at least in the first instance, to perform repairs and service for certain classes of defects covered by the aforesaid warranty without compensation or reimbursement by respondents and without regular and effective action by respondents to determine whether such repairs and service are in fact fully performed within a reasonable time.

(2) the representation, made directly or by implication in respondents' written warranty disseminated in all states in which respondents do business except California, that said warranty is the sole legal warranty, that it legally excludes and disclaims all implied-in-law warranties, and that said warranty states the sole legal remedy available to the purchaser, when in truth and in fact under the applicable law of several states in which respondents' homes are sold at retail such exclusions, disclaimers or limitations are unenforceable.

(3) the representation, made directly or by implication in respondents' written warranty disseminated in all states in which respondents do business except California, that as a condition precedent to securing full performance by respondents of their warranty obligations every party to whom the warranty is offered must complete properly and mail to respondents a certain owner's registration card at the time he or she purchases said mobile home, when in truth and in fact respondents' internal policy is to provide such performance irrespective of whether the card has been returned.

(4) the representation, made directly or by implication in respondents' written warranty disseminated in all states in which respondents do business except California, that as a condition precedent to securing full performance by respondents of their warranty obligations every party to whom the warranty is offered must transport the defective part or if necessary the entire home to respondents' manufacturing plant, when in truth and in fact it is respondents' policy to provide such performance at the home site.

(b) the failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in

Paragraph Four are competent to perform warranty service or have made adequate arrangements for performing warranty service through independent contractors.

(c) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, notify respondents of the existence of claims initiated by retail purchasers for warranty service or for repair of defects covered by the aforesaid warranty.

(d) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, in fact fully perform and complete within a reasonable time all warranty service and repairs performed on behalf of respondents.

(e) the failure to establish and maintain an effective and regular mechanism for the prompt and fair resolution of mobile home consumer complaints and requests for service and repairs relating to respondents' warranty or warranty policies.

(f) the failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four, either directly or by action through independent contractors, are competent to perform a thorough inspection of a mobile home prior to its tender to a retail customer to determine whether a home contains defects covered by the aforesaid warranty.

(g) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, actually perform or assure the performance of a thorough inspection of a mobile home prior to its tender to a retail customer to determine whether a home contains defects covered by the aforesaid warranty.

(h) the failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four, either directly or by action through independent contractors, are competent to perform the installation or "setup" of the aforesaid mobile homes at the homesite selected by the retail purchaser.

(i) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, actually and competently perform the installation or "setup" of the aforesaid mobile homes.

(j) the failure to maintain an adequate and expert factory service capability or to make other provisions adequate to assure the full performance within a reasonable time of the repair of defects covered by the aforesaid warranty which respondents' "authorized" dealers are unwilling or unable to perform.

The aforesaid failure to maintain a regular and effective system which assures the full performance within a reasonable time of service and repair of defects covered by the aforesaid warranty has the capacity or tendency to impede, delay or prevent the performance of said service and repairs for parties to whom the warranty is offered.

PAR. 9. By and through the aforesaid acts and practices respondents have been and are now:

(a) Disseminating a warranty which fails to fully and completely inform purchasers as to the actual protection offered by respondents.

(b) Failing to establish or maintain an effective or adequate system which assures that respondents will fully correct or repair all defects covered by the aforesaid warranty within a reasonable time.

The aforesaid acts and practices are deceptive and are in violation of Section 5 of the Federal Trade Commission Act.

PAR. 10. By such failure to maintain a regular and effective system which assures that every party to whom the warranty is provided will receive full performance within a reasonable time of the service and repair of defects covered by the aforesaid warranty respondents have been and now are engaged in unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 11. Through the individual and cumulative acts and practices set forth in Paragraph 8(a) respondents are now and have been disseminating and causing the dissemination of a written warranty which fails to fully and accurately describe the true nature and extent of the warranty rights of retail purchasers of respondents' mobile homes and those warranty obligations which in fact respondents undertake in the normal course of business. Thus respondents have failed to disclose material facts which if known to consumers:

(a) would be likely to affect their decision of whether to purchase one of respondents' mobile homes, and

(b) would enable retail purchasers to understand the true nature and extent of their warranty rights and to secure performance of such warranty service.

Therefore, the aforesaid failures to disclose material facts are deceptive and unfair and are in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Commodore Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 8712 W. Dodge Rd., Omaha, Neb.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

1. *It is ordered*, That respondents shall within 90 days from the effective date of this order make a written inquiry of all known retail purchasers of respondents' mobile homes (except those specifically excluded below) built between July 1, 1972 and June 30, 1974, utilizing the form of letter shown in Appendix A attached hereto and made a part hereof which shall contain therein a self-addressed postage paid return envelope, and which shall be mailed to such purchasers by first class mail.

Known retail purchasers are defined as those first purchasers at retail of said mobile homes who communicate with respondents no later than 60 days after the effective date of this order and those first retail purchasers whose names and addresses (1) are contained in company "coach" or unit files and tire records (except that with respect to respondents' manufacturing plants which maintained for the period July 1, 1972 to June 30, 1974 separate files for warranty registration cards the names and addresses of known retail purchasers may be established from such separate files rather than by reference to "coach" or unit files); (2) are supplied by the Federal Trade Commission within 60 days of the effective date of this order or; (3) are supplied to respondents by respondents' past and current dealers in response to respondents' letter request for such information sent by first class mail, (which letters shall be sent no later than 30 days after the effective date of this order) utilizing the form of letter shown in Appendix B[1] attached hereto and made a part hereof and which shall contain therein a self-addressed postage paid return envelope.

Notwithstanding the above, known retail purchasers shall not include:

(a) local, State or Federal Government or agencies thereof;

(b) retail purchasers who are now or have been engaged in litigation with respondents involving their mobile home built by respondents during the two year period set forth hereinabove;

(c) retail purchasers whose homes were sold to them on an "as is" basis;

(d) retail purchasers who communicated directly with respondents' corporate headquarters or its attorneys concerning a problem or defect in such purchaser's mobile home, where there is a record indicating a resolution of the problem to the purchaser's satisfaction;

(e) retail purchasers whose names are supplied by past or current dealers in response to respondents' written inquiries required hereinabove when such names are received by respondents from a dealer more than sixty days after respondents' inquiry was mailed to that dealer unless the purchaser or purchasers themselves communicate with respondents no later than 60 days after the effective date of this order, or the name or names of such purchaser or purchasers appear elsewhere in respondents' individual unit or coach files, (or where applicable, warranty card files) or were supplied to respondents by the Federal Trade Commission as set forth hereinabove;

(f) retail purchasers who live outside the United States or who purchased mobile homes from dealers located outside the United States;

(g) retail purchasers who are known to respondents to no longer own their mobile homes built by respondents.

[2] Notwithstanding the foregoing provisions of this order Paragraph 1, respondent shall not be required to review its "coach" or unit files or, in the alternative, its separate files (if any) for warranty registration cards for the purpose of attempting to obtain names and addresses of

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[1] Order issued Apr. 22, 1975, substituted Exhibit 1 p.492, herein, for Appendix B.

[2] This paragraph was added by order issued Apr. 22, 1975.

the first retail purchasers of respondent's mobile homes insofar as such files relate to respondent's manufacturing plants which have been closed and are not now in operation, but respondent shall be required to undertake such review of such files at respondent's remaining three manufacturing plants at Haleyville, Ala., Lebanon, Oregon, and Danville, Va.

2. *It is further ordered*, That respondents shall, directly or through their dealers or other third parties, repair or service within a reasonable time at the site of the home all defects and malfunctions in mobile homes owned as of the effective date of this order by known retail purchasers, which were produced by respondents during the two year period referred to hereinabove and which become known to respondents in response to the written inquiries required pursuant to Order Paragraph 1 unless it is clear that a given defect or malfunction:

(a) is a result of improper set up of the mobile home;

(b) is a result of improper use or abuse of the mobile home;

(c) did not arise or become evident within the term of the warranty;

(d) was brought to respondents' attention by a retail purchaser more than sixty days after respondents mailed the written inquiry to such purchaser as provided hereinabove where the mobile home was purchased by the first retail purchaser more than one year prior to the effective date of this order;

(e) is a minor cosmetic defect in a home purchased by the first retail purchaser more than one year prior to the effective date of this order.

A reasonable time for accomplishing said repairs or service shall consist of repairs or service:

(a) on no less than fifty mobile homes manufactured by each of respondents' plants per month or;

(b) on a number of mobile homes per plant per month equal to no less than ten percent of the mobile homes owned by known retail purchasers, as the term is used in order Paragraph 1;

whichever is greater, until all said repairs and service are completed.

3. *It is further ordered*, That respondents cease and desist from disseminating, or causing the dissemination of, offering or otherwise providing, in commerce, any express warranties to the retail purchasers of mobile homes manufactured by respondents unless respondents meet all of their obligations under such warranties within the time period standards set forth hereinbelow in Order Paragraph 3(e) and establish and maintain a regular and effective system reasonably designed to assure that every purchaser of the aforesaid mobile homes will receive full performance by respondents, directly or by action through their dealers or other third parties, of all such warranty obligations within the said time period standards. This warranty

performance system shall incorporate but not necessarily be limited to the following standards and terms:

(a) Respondents shall disseminate a warranty and associated documents which clearly and fully describe and effectively communicate to the first retail purchaser;

(1) the identity and address of the warrantor;

(2) the nature and extent of the warranty offered or otherwise provided;

(3) the remedies available to the purchaser under the warranty;

(4) the manner in which respondents intend to provide for performance of their warranty obligations, including disclosure of any delegation of warranty responsibility to third parties; *Provided however*, That disclosure of said delegation must be accompanied by additional disclosure that such delegation in no way relieves respondents of the ultimate responsibility to fulfill all of respondents' warranty obligations;

(5) any and all requirements which must in fact be fulfilled by the retail purchaser as a condition precedent to securing performance by respondents of their warranty obligations;

(6) a uniform procedure to be followed by a retail purchaser in order to request performance by respondents of their warranty obligations;

(7) a unform procedure available to the retail purchaser for a systematic review and disposition of complaints and disputes with respect to the performance of respondents' warranty obligations by respondents' manufacturing plants, subsidiaries, divisions, and other employees, or by respondents' dealers or other third parties.

(b) Respondents shall cease and desist from selling their mobile homes without any express or implied warranty, *i.e.*, "as is," or with any disclaimer of implied warranties or limitations or exclusion of liability under any warranty or disseminating or causing the dissemination of any statement or representation which represents directly or by implication, that respondents have disclaimed any express or implied warranty or limited or excluded any liability under any warranty unless respondents have a reasonable basis in the form of an opinion by legal counsel that said disclaimers, limitations and exclusions are enforceable under governing State law, and clear and conspicuous notice of said "as is" sale or other said disclaimer, limitation or exclusion is given to prospective retail purchasers of their mobile homes prior to the execution of the contract of retail purchase. A clear and conspicuous notice of an "as is" sale shall contain at a minimum the following language:

NOTICE

The manufacturer of this mobile home sells it "as is" and refuses to assume any responsibility for defects. The purchaser of this mobile home must accept it with all defects and take the entire risk, under contract law, as to its condition.

Provided, however, That with respect to: (a) the "as is" sale of damaged, salvaged, demonstrator or repossessed mobile homes, (b) the sale of mobile homes where respondents disclaim or fail to grant an express warranty on appliances which are covered by a separate written warranty by a supplier or manufacturer other than respondents and (c) the "as is" sale of mobile homes to local, State and Federal Governments or agencies thereof, the aforesaid opinion by legal counsel shall not be required.

(c) All of respondents' warranty service and repair obligations performed subsequent to the tender of the home to the retail purchaser shall be rendered by respondents, directly or through their dealers or other third parties at the site of the mobile home.

(d) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealers or any other persons not employees of respondents to:

(i) determine whether any mobile home manufactured by respondents contains defects which are within the scope of a warranty extended by respondents or otherwise requires remedial action pursuant to said warranty;

(ii) notify respondents of the existence of those circumstances enumerated in subparagraph (d)(i) above; or

(iii) perform any repairs or otherwise provide services in satisfaction of any warranty obligations incurred by respondents;

respondents shall, beginning within 120 days of the effective date of this order, assure that if a dispute or disagreement should arise between respondents and one or more of said dealers or other third persons as to which of them is to incur any such responsibility with respect to warranty repairs and service or is to correct a malfunction related or alleged to relate to setup of the aforesaid mobile homes, any and all necessary repairs or other corrective action will be expeditiously provided (in the normal course of business) in a manner consistent with this order, regardless of whether the said dispute or disagreement has been resolved. The "normal course of business" does not include:

(1) conditions under which abnormal demands are made upon service capabilities as a result of natural disasters, other acts of God or the government (including the effects of remedial action required of respondents as set forth in order Paragraphs 1 and 2, above), or any other event beyond the control of respondents and their dealers which places an unusually large demand upon service facilities;

(2) conditions resulting from disasters, strikes, acts of the government, instances of force majeure or other similar occurrences which are beyond the control of respondents and their dealers and which prevent respondents and their dealers from responding to service requests within the time periods stated hereinbelow;

(3) slight omissions or deviations from the terms of this order which are inadvertent, unintentional, and not due to bad faith of respondents;

(e)(1) Respondents shall, beginning within 120 days of the effective date of this order, directly or through their dealers or other third parties commence, in the normal course of business as set forth in order Paragraph 3(d) above, all warranty service or repairs of defects giving rise to a condition which affects the safety of a mobile home or renders it substantially uninhabitable, as soon as possible but in no event later than three business days following receipt of notice of such defect by respondents from the retail purchaser, or two business days following notice of the determination made by respondents' dealer pursuant to order Paragraph 3(i)(3)(iii) below, and shall complete such service or repairs expeditiously.

(2) Respondents shall, except as set forth in order Paragraph 3(e)(1) above, beginning within 120 days of the effective date of this order, directly or through their dealers or other third parties, in the normal course of business, as set forth in order Paragraph 3(d) above: (a) respond to notice of the need for warranty service or repairs within a reasonable time not to exceed seven business days of receipt of said notice by respondents or their dealers and (b) complete said service or repairs within a reasonable time not to exceed thirty days following said receipt of notice.

(3) *Provided, however*, That in the event of a bona fide dispute between respondents or their dealers and a retail purchaser requiring resolution through the procedure established pursuant to order Paragraph 3(m) below, as to whether the defect(s) complained of by the retail purchaser are or are not covered by respondents' warranty, then: In the event it is determined that warranty service or repair is required, which determination shall be made promptly respondents shall be allowed, in the normal course of business as set forth in order Paragraph 3(d) above, from the date of notification of the dispute as set forth in this subparagraph (e)(3) no more than three business days in the case of defects referred to in subparagraph (e)(1) above to commence service or repair (such repairs to be completed expeditiously), and no more than thirty days in the case of defects referred to in subparagraph (e)(2) above to complete service or repair.

(f) Respondents shall, except as provided in order Paragraph 3(h) below, in the normal course of business as set forth in order Paragraph

3(d) above, beginning within 120 days of the effective date of this order, inspect at the home site directly or through their dealers or other third parties, each mobile home prior to or at the time of tender of possession to the retail purchaser to assure that the mobile home is being delivered to such purchaser free of all ascertainable defects and is properly set up, except for deficiencies which do not affect the home's safety or habitability, which shall be noted in the owner dealer final delivery checklist (Appendix C), and which shall be then remedied in accordance with subparagraph (e)(2) above.

(g) Respondents shall, in the normal course of business as set forth in order Paragraph 3(d) above, beginning within 120 days of the effective date of this order, reinspect, directly or through their dealers or other third parties each mobile home between forty-five and ninety days after tender of possession to the retail purchaser to determine the existence of and to correct or arrange for the correction of any defects covered by respondents' warranty in the mobile home, or improper set up and problems arising therefrom.

Results of each of the inspections required in order Paragraphs 3(f) and 3(g) hereinabove will be documented in a report or reports which shall be required to be signed by respondents' dealer and if possible by the retail purchaser or said purchaser's representative, indicating agreement with the information set forth therein. The reports documenting the results of the aforesaid inspections may be in the formats set forth in Appendices C and D attached hereto, or in formats substantially equivalent thereto.

(h) If the retail purchaser elects to provide for the set up of his mobile home himself, then in such cases the responsibility of respondents and their dealers for transportation, set up, inspection and reinspection, as set forth in subparagraph (f) and (g) above, shall terminate with the delivery or tender of possession to the retail purchaser or his agent or representative.

(i) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealers to perform the obligations set forth in order Paragraph 3(d) above, respondents shall enter into written contractual agreements with such dealers which:

(1) adequately and accurately describe the scope of those responsibilities, to be borne by said dealers as aforesaid, as well as the responsibility for properly setting up respondents' mobile homes;

(2) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) to provide respondents with the name and address of each retail purchaser and the date of each purchase;

(3)(i) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i), to commence all warranty service, or repair of defects, giving rise to a condition which affects the safety of a mobile home or renders it substantially uninhabitable as soon as possible but in no event later than three business days following receipt by the dealer of notice of such defect or condition and to complete such service or repairs expeditiously;

(ii) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i), to complete all other warranty service or repairs within a reasonable time, not to exceed thirty days following receipt by the dealer of notice of such condition;

(iii) set forth that the requirements of subparagraph (i)(3)(i) and (i)(3)(ii) above shall apply only to those cases in which the dealer responds to and completes the service or repairs himself. In those cases in which the dealer determines to rely upon respondents to perform or to complete service or repairs requested by retail purchasers under: (a) subparagraph (i)(3)(i) above, such determination shall be made and communicated to respondents as soon as possible but in no event later than two business days after dealer's receipt of notice from the retail purchaser. (b) subparagraph (i)(3)(ii) above, such determination shall be made and communicated to respondents as soon as possible but in no event later than five business days of receipt of notice from the retail purchaser.

(4) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) to inspect each mobile home prior to or at the time of tender of possession to the retail purchaser as set forth in order Paragraph 3(f), except as provided in subparagraph (h) above to assure that the home is being delivered to such purchaser free of all ascertainable defects and is properly set up, except for deficiencies which do not affect the home's safety or habitability which shall be noted in the owner dealer final delivery checklist (Appendix C), and which shall then be remedied in accordance with subparagraph (i)(3)(ii) immediately above.

(5) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i), except as provided in subparagraph (h) above, to reinspect each mobile home between forty-five and ninety days after tender of possession to the retail purchaser to determine the existence of and to correct or arrange for the correction of any defects in the mobile home covered by respondents' warranty or improper set up and problems arising therefrom;

(6) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) to provide respondents with reports which will document the results of the inspections set forth in (4) and (5) immediately above and which will be signed by respondents'

dealer and if possible by the retail purchaser or said retail purchaser's representative indicating agreement with the information set forth therein;

(7) provide for a procedure which assures that if a dispute or disagreement should arise between respondents and one or more of said dealers as to which of them is to incur any such responsibility or is to correct an improper initial set up or a malfunction arising therefrom, any and all necessary repairs or other corrective action will be expeditiously provided, regardless of whether the said dispute or disagreement has been resolved;

(8) establish the duty of the dealer to maintain or contract for adequate service personnel and facilities;

(9) set forth service responsibilities in the event that a dealer ceases to be one of respondents' authorized dealers with respect to homes still under respondents' warranty or in the possession of the dealer and not yet sold to a retail purchaser at the time of cessation of the authorization;

(10) set forth the right of respondents to withdraw authorization from dealers failing to meet their responsibilities under the agreement.

Respondents shall cause their authorized dealers as of the effective date of this order to execute such agreements (which agreements shall be immediately effective) within 180 days of the effective date of this order, or shall thereafter accept no further orders from such dealers until they have executed such agreements. Respondents shall cause dealers initially authorized after the effective date of this order to execute such agreements at the time of their authorization.

Such agreement shall be in the format set forth in Appendix E attached hereto or in a format substantially equivalent hereto.

The "normal course of business" as used in this order Paragraph 3(i) shall not include:

(1) conditions under which abnormal demands are made upon service capabilities as a result of natural disasters, other acts of God or the government, or any other event beyond the control of the dealer which places an unusually large demand upon the dealer's service facilities;

(2) conditions resulting from disasters, strikes, acts of the government, instances of force majeure or other occurrences which are beyond the control of the dealer which prevent the dealer from responding to service requests within the time periods stated hereinabove;

(3) slight omissions or deviations from the terms of this order subparagraph which are inadvertent, unintentional and not due to bad faith of the dealer.

(j) Respondents shall send a questionnaire (using the format set forth in Appendix F attached hereto or in a format substantially equivalent thereto) to all persons other than "as is" purchasers who after the effective date of this order purchase at retail respondents' mobile homes which inquires as to:

(1) the existence of any defects in said mobile homes covered by respondents' warranty or improper setup or problems arising therefrom;

(2) whether the retail purchaser notified anyone of such defects or setup problems, and if so who was notified and when did such notification take place;

(3) the identity of any person who sought to service such defects or setup problems;

(4) whether such defects or setup problems were fully repaired, the period of time required to effect such repairs, and the identity of the parties who accomplished such repairs;

(5) whether the retail purchaser is satisfied with the promptness and quality of the repair.

Such questionnaire in the form of a postage paid self addressed post card or a letter containing a postage paid self-addressed envelope, shall be sent between ninety and one hundred twenty days subsequent to the tender of possession of the home to the retail purchaser.

(k) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealer or any other persons not employees of respondents to perform any of the responsibilities set forth in order Paragraph 3(d) hereinabove, respondents shall fully evaluate the level of expertise and physical and personnel resources of such dealers or other persons with respect to the ability to inspect, repair, service and setup all mobile homes manufactured by respondents prior to such delegation or reliance to assure that all said persons are capable of performing said responsibilities or have provided for such performance through a third party having such capability, in accordance with the standards set forth herein.

Respondents shall in addition regularly review and evaluate the manner in which such persons, directly or through another third party, perform the aforesaid responsibilities and maintain their service capabilities and shall withdraw said reliance and authorization from persons failing to meet those responsibilities or the standards set forth herein.

[3](l) The person or persons to whom the responsibility for supervising and assuring the implementation of respondent's warranty service program is delegated shall make periodic reports at least on a monthly

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[3] Reported as modified by order issued Apr. 22, 1975.

basis to respondent's responsible officers which shall include current information concerning:

1) the current cost to respondent of warranty service;

2) the incidence and nature of frequently recurring defects;

3) those measures undertaken in response to reports of frequently recurring defects including but not limited to modification in production and design of respondent's mobile homes;

4) analysis of the manner in which respondent's employees, dealers and other third parties are performing warranty and setup responsibilities.

The direct administration of respondent's warranty service program at the corporate level and the responsibility for supervising and assuring implementation of the warranty service program shall, in any fiscal year following a fiscal year during which respondents and their subsidiaries produce more than 5,000 mobile homes, be vested in only those corporate officials who have no direct responsibilities on a day-to-day basis for the sale of respondent's mobile homes.

(m) Respondent shall, beginning within 120 days of the effective date of this Order, establish a uniform procedure for the systematic receipt and analysis and fair disposition of all complaints or disputes which may arise between the aforesaid retail purchasers of respondent's mobile homes and respondent or respondent's dealers or other third parties, regarding any alleged warranty obligations of respondent.

Such procedure shall incorporate but not necessarily be limited to:

1) prompt evaluation and response by respondent to all complaints within a reasonable time not to exceed five business days after receipt by respondent;

[4] 2) In any fiscal year following a fiscal year during which respondent and its subsidiaries produce more than 5,000 mobile homes, the designation of a single responsible department within respondent's corporate organization for the receipt of said complaints;

[4] 3) an effective mechanism for the fair and impartial resolution of such disputes. In any fiscal year during which respondents and their subsidiaries produce more than 5,000 mobile homes, the responsibility for resolving disputes through said mechanism shall be vested in only those personnel who are not responsible for sales on a day-to-day basis;

4) an accurate and complete record keeping system regarding the nature and disposition of all such disputes and complaints received by respondent;

5) periodic review and evaluation by respondent of the effectiveness of such procedures and correction of such procedures where necessary.

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[4] Paragraphs 3(m)(2) and 3(m)(3) reported as modified by order issued Apr. 22, 1975.

(n) Respondents shall, beginning within 120 days of the effective date of this order, maintain full and adequate records which disclose.

(1) the date of receipt, disposition and the date of disposition of each request for warranty service (including any refusal to accept a request and the reason for such refusal) received by respondents; and

(2) the results of the evaluation of service capacity provided for in order Paragraph 3(k) above.

4. *It is further ordered,* That respondents shall forthwith distribute a copy of this order to each of their operating divisions or manufacturing plants engaged in the manufacture, offering for sale, sale, and distribution of mobile homes.

5. *It is further ordered,* That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in the corporation which may affect compliance obligations arising out of this order.

6. *It is further ordered,* That respondents shall, at intervals of 9, 18, and 24 months following the effective date of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order. Such reports shall include but not be limited to the periodic reports submitted to respondents' responsible officers described in order Paragraph 3(l) above.

7. *It is further ordered,* That respondents shall furnish to the Commission nine months after the effective date of this order, a report which discloses the dates and manner in which dealers and retail purchasers were contacted pursuant to the procedures described in order Paragraph 1 above, and the dates and manner in which dealers and retail purchasers acted in response thereto and the dates and manner in which respondents acted in response to allegations by retail purchasers which purported to create an obligation on the part of respondents under the terms of order Paragraph 2 above. Respondents shall for a period of two years after the effective date of this order maintain records which are adequate to disclose respondents' compliance with order Paragraphs 1 and 2, in order that such records may be furnished by respondents to the Federal Trade Commission upon request.

8. *It is further ordered,* That respondents shall submit to the Federal Trade Commission for its review copies of any proposed substantial revisions in the questionnaire required pursuant to order Paragraph 3(j), the dealer agreement required pursuant to order Paragraph 3(i), and the warranty documents described in order

Paragraph 3(a), at least 60 days prior to the proposed effective date of any such revisions. Such submissions will be required for the three years following the effective date of this order.

9. At the time of their execution of this agreement, proposed respondents are debtors-in-possession in proceedings under Chapter XI of the Federal Bankruptcy Act which are pending in the United States District Court for the District of Nebraska. Proposed respondents have filed in such proceedings a proposed plan of arrangement in which provision is made for the payment of obligations of proposed respondents to their unsecured creditors; and proposed respondents presently contemplate that said plan, or an amended version thereof, will be confirmed in due course by said Court. *Accordingly, it is further ordered*, That notwithstanding the provisions of Order Paragraph 2, if at the time this order becomes effective, the retail purchasers who would be entitled to relief under the provisions of order Paragraph 2 have by virtue of an appropriate order of said Court or said plan of arrangement or as a matter of law at least 180 days to file claims in said Chapter XI proceedings in respect of the matters as to which repairs or service is required pursuant to order Paragraph 2, then within 120 days after the effective date of this order proposed respondents shall give written notice to each such retail purchaser of his right to file such a claim in said Chapter XI proceedings, and the timely giving of such notices by proposed respondents shall be deemed for all purposes to have satisfied the requirements of order Paragraph 2; *Provided*, That the form and content of such notice shall be subject to prior approval by the Bureau of Consumer Protection of the Commission and, if required, by the Court having jurisdiction over said Chapter XI proceedings. If at the time this order becomes effective, such retail purchasers do not have said 180-day period to file claims as aforesaid, then the provisions of this paragraph shall not supersede the provisions of order Paragraph 2 and the provisions of order Paragraph 2 shall remain in full force and effect.

APPENDIX A

(DATE)

DEAR MOBILE HOME OWNER:

Thank you for purchasing one of the Commodore Corporation's family of mobile homes. Our homes are warranted to be free from defects in material and workmanship. Any repairs required by your warranty should have been performed in full by the dealer who sold you your home or, if this was not possible, by the factory which manufactured it. Through the following questionnaire, we are seeking to determine your experience with regard to service so that we may be sure you have received full performance of warranty obligations. If you have not received such full performance, your response to the following questions will enable us to provide you with the warranty service to which you are entitled.

Please respond to the following questions and return this letter in the enclosed postage-paid envelope.

(1)(a) Have you experienced problems with your mobile home that you feel are covered by our warranty described above (check one) [ ] yes [ ] no

(1)(b) If the answer to (1)(a) is yes, please tell us *when* the problems occurred and *describe* them. ________________

(2) If you have experienced problems that you feel are covered by our warranty, please advise us of *whom* you contacted and *when* the contact was made. ________________

(3)(a) If you contacted someone regarding a warranty problem, was the problem corrected (check one): [ ] yes [ ] no

(3)(b) If the answer to 3(a) was yes, please indicate *how long* it took to correct the problem, and *who* performed the repair: ________________

3(c) If the answer to 3(a) was No, does the problem still exist (check one): [ ] yes [ ] no

3(d) If the answer to 3(c) was Yes, please describe the current condition of the problem and any attempts at correction you have made: ________________

4(a) If warranty service was provided, were you satisfied with:

(1) the promptness of repairs (check one): [ ] yes [ ] no

(2) the quality and completeness of repairs (check one) [ ] yes [ ] no

4(b) If your answer to 4(a)(2) was No, does the problem which was the subject of warranty service still exist (check one): [ ] yes [ ] no

4(c) If your answer to 4(b) was yes, please explain and describe the current condition of the problem and any attempts at correction you have made: ________________

5(a) Who performed the set-up or installation of your moblie home? (*Name*) (*relationship, dealer, park operator, independent contractor, etc.*) (*location*)

5(b) Has there been any doubt or dispute as to whether a problem you have experienced with your mobile home was a problem covered by your warranty or due to improper set-up or installation (check one): [ ] yes [ ] no

5(c) If the answer to 5(b) was Yes, does the problem still exist (check one): [ ] yes [ ] no

5(d) If the answer to 5(c) was Yes, please describe the current condition of the problem and any attempts you have made to get the problem corrected: ________________

5(e) Are you satisfied with the manner in which your mobile home was set-up or installed (check one): [ ] yes [ ] no

5(f) Please advise us of any suggestions that you might have that will enable us to increase the quality, utility, and value that we strive to build into our homes. ________________

Note: This questionnaire was mailed to you as your name and address appear in our records. If there is need for a correction, please make it in the space provided. Also we ask that you supply us with your telephone number in the space provided as it will facilitate our reaching you to discuss any problems with our product or service that you have pointed out.

(Name of Customer) ________________

(Street address) ________________

(City, State, Zip) ________________

Telephone Number (including area code) ________________

We thank you for responding to the questions set forth above. Please return this letter to us in the enclosed postage paid envelope.

Sincerely,

APPENDIX B *

[Exhibit 1]

THE COMMODORE CORPORATION

TO: All Present and Former Dealers of The Commodore Corporation and its Subsidiaries

As you may know, The Commodore Corporation has entered into an agreement with the *Federal Trade Commission* which will entitle certain retail purchasers of mobile homes manufactured by Commodore or its subsidiaries to file claims in Commodore's Chapter XI proceedings under the Federal Bankruptcy Act with respect to alleged unrepaired warranty service problems. Such purchasers may then be able to receive cash payments in accordance with the terms of the bankruptcy proceeding.

Because Commodore's unit files and warranty registration records do not provide the necessary information for a number of mobile homes, Commodore is required by the Federal Trade Commission agreement to seek your assistance in obtaining such information.

We wish to obtain the names and addresses of the initial retail purchasers of all mobile homes which may have been manufactured by The Commodore Corporation and its subsidiaries during the period from July 1, 1972, through June 30, 1974. Since you purchased mobile homes from Commodore or its subsidiaries during such period, we believe that you will have records containing all or some of the required names and addresses.

Please list below the names and addresses of the initial retail purchaser of each mobile home which may have been manufactured by Commodore or its subsidiaries during the period from July 1, 1972, to June 30, 1974, and purchased by you, together with the serial numbers of such mobile homes. If your records do not show the date on which any given home was manufactured please supply the information for units for which agreements of retail sale were signed during the period May 1, 1972 to August 1, 1974.

You should return this letter to us in the enclosed postage-paid envelope not later than ____________ 1975.

We hope you appreciate that supplying this information might be of substantial assistance to your past retail purchasers.

Very truly yours,
THE COMMODORE CORPORATION
By: Orvil C. Bachman, Vice Pres.

Dealer's Name and Address: ____________________

Serial Numbers	Name and Addresses
____________	____________
____________	____________
____________	____________

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* This form of letter is the one replaced by order issued Apr. 22, 1975.

APPENDIX C

Owner-Dealer Final Delivery Checklist

Owner:	**Dealer:**
______________________	______________________
(Name)	(Name)
______________________	______________________
(Address) (Phone No.)	(Address) (Phone No.)
______________________	______________________
(City) (State) (Zip)	(City) (State) (Zip)

Model and Serial Number ______________________

The dealer has completed inspection of the home with the owner. The following items have been checked in accordance with the manufacturer's Field Installation Manual and found satisfactory:

Setup

Blocked and leveled. ______________

(Doublewides only) Halves aligned and exterior and floor covering installation completed. ______________

Anchors and tie-downs installed in accordance with local requirements. ______________

Utilities

The following have been connected:

Fuel (gas or oil) ______________

Water supply ______________

Sewage ______________

Electric power supply ______________

Exterior

Proper operation of doors and windows, including screens or storms. ______________

Roof seams ______________

Siding and trim ______________

Interior

Ceilings ____________

Paneling ____________

Holdings ____________

Floor coverings ____________

Curtains and drapes ____________

Lamps and light fixtures ____________

Electrical receptacles, circuit breakers and light switches ____________

Interior doors ____________

Cabinets and drawers ____________

All plumbing fixtures ____________

Furniture ____________

Appliances

Furnace ____________

Water heater ____________

Range and oven ____________

Refrigerator ____________

Washer and dryer ____________

Garbage disposer ____________

Air conditioner ____________

The Manufacturer's Warranty, Owner's Manual, Field Installation Manual, all appliance manuals and all required keys have been delivered and explained to the owner.

Any adjustments or repairs remaining to be done (describe briefly) ____________

____

____

____

The above inspection has been completed to my satisfaction, except for the adjustments or repairs remaining to be done as noted above.

________________________________ Date ____________

Owner's signature

____

Signature of dealer's representative

APPENDIX D

Reinspection Report

Owner:	**Dealer:**
______________________________	______________________________
(Name)	**(Name)**
______________________________	______________________________
(Address) (Phone No.)	**(Address) (Phone No.)**
______________________________	______________________________
(City) (State) (Zip)	**(City) (State) (Zip)**

Model and Serial Number ______________________________

The dealer has reinspected the above home within 30 to 90 days after original delivery. The following items were checked and any necessary repairs or corrections made:

Supporting piers ____________
Leveling ____________
Roof ____________
Doors and windows ____________
Plumbing ____________
Heating and Air Conditioning ____________
Electrical System ____________
Appliances ____________

Any adjustments or repairs remaining to be done ____________________

____

____

The above reinspection and any necessary adjustments or repairs (except as otherwise noted above) have been completed to my satisfaction.

______________________________ **Date** ____________
Owner's signature

APPENDIX E

________________________ ________________________ ________________________

("Dealer") *("Manufacturer")*

SERVICE AGREEMENT

THIS AGREEMENT is entered into between Dealer and Manufacturer on the date set forth below. Dealer wishes to act or continue to act as a retail dealer of mobile homes produced by Manufacturer ("Homes"), and Manufacturer wishes Dealer to perform service including service under Manufacturer's written warranty. Recognizing that satisfaction and good will of homeowners are of primary importance and can be best achieved by Dealer and Manufacturer providing prompt, efficient and courteous service, and in consideration of Manufacturer's sales to Dealer, Dealer's purchases from Manufacturer, and their agreements herein, the parties mutually agree:

1. *Manufacturer Inspection and Correction.* Before shipment to Dealer, Manufacturer shall inspect every Home and correct discovered manufacturing defects.

2. *Dealer Inspection.* Dealer shall thoroughly inspect each Home and promptly initiate repair of any discovered defect. "Dealer Inspection" shall consist of inspection of each Home at the following times:

a. immediately upon receipt from Manufacturer

b. immediately before delivery by Dealer to any retail purchaser of a Home ("Homeowner")

c. immediately after setup, utility connection and site servicing, *and*

d. between 30 and 90 days after setup, in conjunction with any necessary releveling.

3. *Dealer Setup and Service.*

a. Dealer shall employ or contract for setup and service personnel who, in Manufacturer's reasonable judgment, are competent to set up Homes, and to provide both Reimbursable Service and Non-Reimbursable Service as defined and specified below. Dealer shall promptly respond to all Homeowner requests for such service, and shall promptly complete all such service within Dealer's ability, subject to Manufacturer's authorization to perform any Reimbursable Service.

b. Dealer agrees that setup of each Home shall be performed according to instructions contained in Manufacturer's Field Installation Manual, and any applicable federal, state or local statutes, ordinances, codes or regulations. Setup of each Home (including releveling and resolution of any problem resulting from improper setup) is Dealer's responsibility regardless of who does the setup.

c. Dealer shall perform Non-Reimbursable Service at Dealer's sole cost and expense, which shall include the examples of minor repairs and adjustments listed on the Attachment to this Agreement.

4. *Manufacturer Reimbursement.*

a. If Dealer reasonably believes that a Homeowner service request requires Reimbursable Service, Dealer shall request approval of and reimbursement by Manufacturer in accordance with Manufacturer's Homeowner Service Program Manual. Absent such authorization, Dealer shall not be entitled to reimbursement for service. Dealer will be entitled to reimbursement only for the amount authorized by Manufacturer.

b. "Reimbursable Service" means service to correct a defect existing at the time a Home is delivered by Manufacturer to Dealer. Reimbursable Service includes the examples listed in the Attachment to this Agreement. Service to correct any other defect, including any related to or resulting from delivery to the Homesite, setup, and any service necessary to correct any reasonably discoverable defect not noted in writing on a

Check Out Sheet to be signed by Dealer when the Home is delivered to Dealer, is Non-Reimbursable Service.

5. *Completion of Service.* Except as provided in paragraphs 6 and 7 below, Dealer shall in the normal course of business begin and complete all Reimbursable and Non-Reimbursable Service within a reasonable time but not later than thirty days after Dealer receives notice of the need for such service. But if Dealer or Manufacturer determines that a defect affects the safety of a Home or renders it substantially uninhabitable, Dealer shall in the normal course of business begin Non-Reimbursable and/or Reimbursable Service within three business days after receipt of notice of the need for such service, and shall quickly complete such service. "In the normal course of business" does not include (a) a condition under which abnormal demands are made upon service capabilities as a result of a natural disaster, other Act of God, or the government or any other event beyond the control of Dealer that places an unusually large demand 7. *Service facilities or (b) an event such as a disaster, strike, act of government, or any other occurrence beyond the control of Dealer that prevents Dealer from responding to a service request within the times stated above.*

6. *Manufacturer Service.* If any request appears to require Reimbursable or Non-Reimbursable Service beyond Dealer's ability, Dealer shall immediately examine the Home and inform Manufacturer by telephone no later than five business days after receipt of the service request. Manufacturer shall, if it agrees with Dealer's determination, promptly process such service request as if received directly from the Homeowner, and shall arrange for service to be performed within the time periods set forth in paragraph 5 above. However, if Dealer believes that a defect affects the safety of a Home or renders it substantially uninhabitable, and that repairs are beyond Dealer's ability, Dealer shall tell Manufacturer within two business days after receipt of the Homeowner request, and Manufacturer shall begin any such service within two business days after being informed by the Dealer.

7. *Service in Event of Dispute.* If Manufacturer and Dealer disagree as to whether Reimbursable or Non-Reimbursable Service is required, and if Dealer fails or refuses to correct a problem within a reasonable time but not longer than the times stated in paragraph 5 above, Manufacturer shall do so. Manufacturer shall discuss with Dealer which type of service was required, and Dealer shall promptly pay Manufacturer its reasonable cost of performing any Non-Reimbursable Service.

8. *Dealer/Homeowner Inspections.* Manufacturer shall provide Dealer with forms to be used by Dealer in performing the inspections required by paragraph 2 above. Dealer agrees:

a. diligently and timely

(i) to make such inspections,

(ii) to complete such forms, and

(iii) to note in writing on such forms any discovered manufacturing defect or remaining dealer responsibility item which shall be remedied as if Homeowner had notified Dealer of such defect or item;

b. promptly to send the originals of such forms to Manufacturer and to provide each Homeowner with copies of those required by paragraphs 2.c. and 2.d. above; and

c. whenever possible, to obtain the Homeowner's signature on such forms.

Dealer shall not knowingly deliver possession of a Home with any defect that affects the safety of a Home or renders it substantially uninhabitable.

9. *Retail Contract and Records.* Before execution of the retail sales contract, Dealer agrees to show to each Homeowner a copy of Manufacturer's warranty to be furnished with the Home. The Homeowner's copy of such warranty and any owner's manuals (including the Field Installation Manual), instructions and other materials that Manufacturer may furnish to Dealer for delivery to Homeowner shall be delivered to

Homeowner with possession of the Home. Dealer agrees to keep such records concerning Homeowners as Manufacturer may reasonably require and to furnish Manufacturer with information from such records. Dealer further agrees to provide to Manufacturer such information as Manufacturer may reasonably request concerning: (a) service requests from, complaints by, and other communications with Homeowners and (b) service activities with respect to Homes.

10. *Factory Training and Consultation.* Manufacturer agrees to provide training programs for Dealer service and setup personnel at such locations as Manufacturer may determine, without charge by Manufacturer. Manufacturer further agrees to consult with Dealer and to provide technical advice to Dealer concerning Home service and setup, if requested by Dealer.

11. *Termination.* If the Dealer/Manufacturer relationship is terminated, their obligations under this Agreement to inspect and service sold and unsold Homes shall continue and be unaffected by such termination. Dealer's obligations under this Agreement to furnish information, records and forms shall survive any such termination.

12. *Effect and Formalities.* Failure by either party to perform its obligations under this Agreement shall be good and sufficient cause for the other to terminate this Agreement and the Dealer/Manufacturer relationship. If any Agreement provision is declared legally invalid or unenforceable, the remaining provisions shall continue to be enforceable. More than one copy of this Agreement may be executed, each of which shall be deemed an original for all purposes. The paragraph headings herein are for convenience only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement, except capitalized and quoted words defined for purposes of this Agreement. This Agreement supersedes any prior agreement, either written or oral, between the parties as to service. It shall be binding upon and benefit the parties and their heirs, legal representatives, successors and assigns; but it may be assigned or otherwise amended or supplemented only in writing. *Time is of the essence of this Agreement*, and provisions relating to time of performance may be strictly construed.

IN WITNESS WHEREOF, Manufacturer and Dealer have executed this Agreement effective , 19 . Address of Dealer for notices:

____________________ ____________________

(Type or print name of signer)

____________________ ____________________

By: *for the Dealer (Title)*

Address of Manufacturer for notices:

____________________ ____________________

(Type or print name of signer)

____________________ ____________________

By: for the Manufacturer (Title)

Attachment to Service Agreement

Examples of Non-Reimbursable Service

A. Setting up all unassembled furniture, including but not limited to dinettes and bed frames.

B. Installing all light shades shipped loose.

C. Mounting or assembling all parts of the mobile home that are shipped loose as Manufacturer's normal procedure.

D. Making minor repairs to plumbing, electrical and gas systems.

E. Recaulking and resealing any roof seam or opening if necessitated by Dealer transportation or setup.

F. Recaulking all windows and doors if necessary to reduce leaks or drafts.

G. Making minor appliance adjustments and repairs.

H. Adjusting all doors, windows and drawers for proper operation.

I. Retacking any moldings that have come loose in transit or during setup.

J. Tightening wheel lug bolts before unit is delivered.

K. Making all repairs necessitated by delivery to Homeowner or improper setup.

L. Making routine cosmetic and other minor repairs.

M. Adjusting or replacing door locks and window cranks.

N. Fixing gas and water line leaks.

O. Tightening loose fittings.

Examples of Reimbursable Service

A. Making repairs necessary to correct manufacturing code deviations existing at the time of delivery to the Dealer.

B. Replacing defective materials; e.g., delaminated or discolored wall paneling or ceiling panels, if due to factory defect.

C. Making major interior repairs due to leaks if caused by faulty manufacture.

D. Repairing damages caused by frame failure if due to improper manufacture and not road damage or other causes for which Manufacturer is not responsible.

E. Replacing defective equipment (e.g., light switches, tires, kitchen sinks) existing at the time of delivery to Dealer.

F. Making repairs to exterior metal damaged prior to delivery to Dealer.

G. Replacing paneling and floor coverings damaged by water leaks if caused by faulty manufacture and not improper setup or other causes.

H. Replacing and rehanging excessively warped doors, if due to factory defect.

I. Repairing and replacing floor covering damaged at the factory.

APPENDIX F

Dear Homeowner:

We appreciate your purchase of a mobile home built by Skyline. We sincerely believe you have chosen one of the very best values available in housing today.

Nothing is more important to us than your total satisfaction with your home, including the setup and services provided by your dealer. Would you kindly take a few minutes to complete and return this questionnaire? It will help up and your dealer to serve you better.

Dealer's Name ______________________________

City ______________________________

Approximate Date of Delivery ________________

Was your home delivered in good condition and set up in a satisfactory move? Yes [ ] No [ ]

Did you receive your Homeowner's Manual, Field Installation Manual, and manufacturer's warranty? Yes [ ] No [ ]

Did your dealer go through your home with you after setup and make sure everything was in good order? Yes [ ] No [ ]

If any adjustment, repairs or corrections were needed, were they completed satisfactorily and within a reasonable time? Yes [ ] No [ ]

Who did the work (if you know)? Dealer [ ] Contractor [ ] Factory [ ]

If you answered "no" to any of the above questions, please explain ____

____

____

IN THE MATTER OF

ALBERTSON'S, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2644. Complaint, Mar. 4, 1975 - Decision, Mar. 4, 1975

Consent order requiring a Boise, Idaho, chain of retail food stores, among other things to cease advertising merchandise at sale prices and having insufficient quantities available to meet demand. The order further requires respondent to include in advertisements statements as to the availability of advertised products, to mark advertised products with the advertised price, to make "rain checks" available and post notices to that effect, and to maintain surveillance on their stores to insure compliance with the provisions of the order.

Appearances

For the Commission: *W. Lee Buck.*

For the respondent: *Robert W. Graham, Bogel, Gates, Dobrin, Wakefield & Long,* Seattle, Wash.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Albertson's, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Albertson's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1623 Washington St., Boise, Idaho.

PAR. 2. Respondent is engaged in the operation of a chain of retail food stores, operating in the States of Washington, Oregon, Colorado, Idaho, California, and other states in the United States. Its volume of business is substantial. In the operation of its retail food stores, respondent offers and sells to its customers an extensive line of products, including food, as that term is defined in the Federal Trade Commission Act, groceries and other merchandise, all of which are sometimes referred to hereafter as "items." Some of said items are manufactured or processed by respondent at its manufacturing and processing plants located in various states. However, many of said items are purchased from numerous independent suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid items to be shipped and distributed from its manufacturing and processing plants or from its other sources of supply to its warehouses, distribution centers, or retail food stores located in various states other than the state of origination, distribution or storage of said items. Respondent maintains, and at all times mentioned herein has maintained a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid items by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said items from respondent; and respondent has been and is now disseminating, and causing the dissemination of, advertisements concerning said items by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase from respondent of the said items in commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of the said advertisements list or depict the aforesaid items and also contain statements and representations concerning the price or terms at which said items would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the locations of respondent's food stores at which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated and now being disseminated in various areas of the United States served by respondent's retail food stores, respondent has represented and is now representing directly or by implication that in those stores covered by such advertisements,during the effective periods of the advertised offers, the items listed or depicted in such advertisements would be or are:

A. Readily available for sale to customers;

B. Conspicuously available for sale at or below the advertised prices; and

C. Sold to consumers at or below the advertised price.

PAR. 6. In truth and in fact, in a number of respondent's retail food stores located in the Portland, Oreg.; Seattle, Wash.; and Denver, Colo., metropolitan areas in which the aforesaid advertisements were disseminated, in stores covered by such advertisements, during the effective periods of the advertised offers, a substantial number of items listed or depicted in the said advertisements were or are:

A. Not readily available for sale;

B. Not conspicuously available for sale at or below the advertised prices; or

C. Sold to customers at a price higher than the advertised price. Therefore, the statements and representations as referred to herein, were and are false, misleading and deceptive, and each of such advertisements was and is misleading in material respects and constituted, and now constitutes a "false advertisement," as that term is defined in the Federal Trade Commission Act.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have in each of its stores covered by such advertisements, during the effective periods of the advertised offers, in quantities sufficient to meet reasonably anticipated demands, the advertised items:

A. Readily available for sale to customers; or

B. Conspicuously available for sale at or below the advertised prices;

respondent has been and now is engaged in unfair acts and practices.

PAR. 8. By disseminating or causing the dissemination of advertisements which offer or present for sale items at specific prices, as aforesaid, and during the effective periods of such advertised offers at certain stores covered by said advertisements, by selling said items or other merchandise to customers at prices higher than the advertised prices, respondent has been and now is engaged in unfair acts and practices.

PAR. 9. In the course and conduct of its business, and at all times referred to herein, respondent has been and now is in substantial competition in commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 10. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices, including the dissemination of the aforesaid "false advertisements," has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and are true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items.

PAR. 11. The acts and practices as aforesaid, and the dissemination by respondent of the false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Respondent Albertson's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware with its office and principal place of business located at 1623 Washington St., Boise, Idaho.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent Albertson's, Inc., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereafter sometimes referred to as items, offered or sold in its retail stores, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

A. Disseminating, or causing the dissemination of any advertisement by any means which offers any items for sale at a stated price, unless during the effective period of the advertised offer at each retail store covered by the advertisement:

1. Each advertised item is readily available for sale to customers in the public area of the store, or if not readily available there, a clear and conspicuous notice is posted where the item is regularly displayed which states that the item is in stock and may be obtained upon request, and said item is furnished on request;
2. There is a sign or other conspicuous marking at the place where an item advertised below regular shelf price is displayed for sale clearly disclosing that the item is "as advertised" or "on sale" or words of similar import as appropriate, and disclosing on such sign or marking, the advertised price;
3. Each advertised item, which is usually and customarily individually marked with a price, is individually, clearly, and conspicuously marked with the advertised price;
4. Each advertised item is sold to customers at or below the advertised price;

The Commission recognizes that technical per se violations of Section I of this order are inevitable despite the honest best efforts of respondent to ensure availability and proper pricing of advertised items. Therefore, in determining compliance with Section I of this order, the Commission will consider (a) all circumstances surrounding nondelivery of advertised products which were actually ordered in quantities sufficient to meet reasonably anticipated demands but were not delivered due to circumstances beyond respondent's control, and (b) all circumstances surrounding failure to make advertised items conspicuously and readily available for sale at or below the advertised prices due to circumstances beyond respondent's control.

Provided, It shall constitute a defense to a charge of unavailability under subparagraph I.A.1. if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records and affidavits as will show that (a) the advertised items were delivered to its stores in quantities sufficient to meet reasonably anticipated demand, or (b) the advertised items were ordered but not delivered due to circumstances beyond respondent's control, and that respondent, upon notice or knowledge of such nondelivery acted immediately to contact the media to correct the advertisement or proposed advertisement to reflect the limited availability or unavailability of each advertised item, and (c) respondent immediately offered to customers on inquiry a "rain check" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price.

Provided, Further, that it shall not be deemed a violation of subparagraphs I.A.1., I.A.2., I.A.3., or I.A.4., if respondent is complying with a specific exemption, limitation or restriction with respect to store, item or price which is clearly and conspicuously disclosed in all advertisements for the product in question.

II.

It is further ordered, That respondent Albertson's, Inc., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or drugs, as those terms are defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated, by United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of any such product, any advertisement which contains any of the offers prohibited by Section I of this order;

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the offers prohibited by Section I of this order.

III.

It is further ordered, That throughout each advertised sale period in each of its retail stores covered by an advertisement, respondent shall post conspicuously (1) at or near each doorway affording entrance to the public, and (2) at or near the place where customers pay for merchandise, notices which contain the following:

A. A copy of the advertisement.

B. A statement that: "All items advertised are readily available for sale at or below advertised price except the following items:

"Rain checks will be gladly issued for these items, that will enable you to purchase these items at or below the advertised price in the near future. If you have any questions, the store director will be glad to assist you."

IV.

It is further ordered, That respondent shall cause the following statement to be clearly and conspicuously set forth in each advertisement which represents that items are available for sale at a stated price at any of its stores: "Each of these advertised items is required to be readily available for sale at or below the advertised price in each Albertson's store, except as specifically noted in this ad."

V.

It is further ordered, That:

A. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store directors who, directly or indirectly, have any supervisory responsibilities as to individual retail stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

B. Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its retail stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

C. Respondent shall, for a period of three (3) years subsequent to the date of this order:

1. Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order;

2. Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

3. Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

D. Respondent shall, all other provisions of this order notwithstanding, on or before each of the first three (3) anniversary dates of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order in the preceding year.

It is further ordered, That respondent shall notify the Commission at least thirty days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall, within sixty days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

HUGH MOONEY T/A ORGANIC MASQUE CO.

CONSENT, ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2645. Complaint, Mar. 6, 1975 - Decision, Mar. 6, 1975

Consent order requiring a Greenwich, Conn., seller and distributor of a skin preparation known as Organic Masque, among other things to cease making false performance and effectiveness claims and misrepresenting the extent to which the product has been tested or the results of its use demonstrated.

Appearances

For the Commission: *Jean F. Greene* and *Mark A. Heller.*

For the respondent: *Charles B. Chernofsky*, Pearl River, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Hugh Mooney, individually and doing business as Organic Masque Co., hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hugh Mooney is an individual trading and doing business as Organic Masque Co., with his principal place of business at 283 Greenwich Ave., Greenwich, Conn.

PAR. 2. Respondent is now, and for some time past has been, engaged in the advertising, offering for sale, sale and distribution of a skin preparation known as Organic Masque.

PAR. 3. In the course and conduct of his aforesaid business, respondent now causes, and for some time last past has caused his said skin preparation, when sold, to be shipped from his place of business in the State of Connecticut to purchasers thereof located in various other States of the United States, and maintains and at all times mentioned herein, has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his aforesaid business, respondent has disseminated, and is now disseminating, and has caused and is now causing the dissemination of false advertisements concerning the said product by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act; and respondent has also disseminated and is now disseminating, and has caused and is now causing the dissemination of false advertising concerning the said product by various means for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of the said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of his aforesaid business, respondent has made, and is now making, numerous statements and representations in magazines, and elsewhere with respect to the ability of the said product to cleanse and cure blemished skin. Typical and illustrative of the statements and representations contained in said advertising and promotional material, but not all inclusive thereof, is the following:

> The most fabulous new cosmetic development in years! An incredible new organic face mask that really works * * * that really draws blackheads, hardened oils, tiny facial hairs and imbedded dirt right out of your pores safely, quickly, easily, at once, right before your eyes! * * * in about fifteen minutes or so Organic Masque becomes firm and dry to the touch * * * look closely and you'll see blackheads, bits of hardened oil, imbedded dirt, old make-up, even facial hairs glued firmly to that mask * * *!

* * * * * * *

This has to be the most fantastic cosmetic product you ever used in your life because you see it work immediately.

PAR. 6. By and through the use of said statements and representations made by respondent in his advertising and promotional materials, respondent is representing and has represented, directly or by implication, that:

1. Organic Masque is a revolutionary development in facial masks;
2. The use of Organic Masque will immediately remove all blackheads and unclog all pores for each individual who uses the product;
3. Organic Masque will produce blemish-free skin on every individual who uses it;
4. Tests or demonstrations which prove the representations numbered 1, 2, and 3 above have been conducted.

PAR. 7. In truth and in fact:

1. Organic Masque is not a revolutionary development in facial masks;
2. The use of Organic Masque will not immediately remove all blackheads and unclog all pores for each individual who uses the product;
3. Organic Masque will not produce blemish-free skin on every individual who uses it;
4. Tests or demonstrations which prove the representations numbered 1, 2, and 3 above have not been conducted.

PAR. 8. In the course and conduct of his business as aforesaid, and at all times mentioned herein, respondent has been in substantial competition in commerce with corporations, firms, and individuals in the sale of skin preparations.

PAR. 9. The use by respondent of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's skin preparation by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of the respondent, as herein alleged, were and are to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Hugh Mooney is an individual, trading and doing business as Organic Masque Co., with principal place of business at 283 Greenwich Ave., Greenwich, Conn.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Hugh Mooney, individually and trading and doing business under the name Organic Masque Co., or under any other name, and his successors, assigns, representatives, agents, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of skin preparations or any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication that:

1. Any such product is a new or revolutionary development;

2. Any such product removes blackheads or will unclog pores, or that the use of any such product produces or helps to produce clear or blemish-free skin;

3. Has any quality, characteristics, or capacity, or will have any result, or will perform in any given manner, or is effective for any purpose, unless each such quality, characteristic, capacity, result, manner of performance, or effectiveness has been fully substantiated by competent and reliable scientific testing.

B. Disseminating or causing the dissemination of any advertising by United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which misrepresents, directly or by implication:

1. The performance, efficacy, capacity, or usefulness, or any characteristic, property, quality, or the result of use of any such product.

2. The extent to which any such product has been tested, or the results of its use demonstrated.

C. Disseminating or causing the dissemination of any advertisement by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any such product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations, acts or practices prohibited in Paragraphs A or B above.

It is further ordered, That the respondent promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent shall within sixty (60) days and at the end of six (6) months after the effective date of the order served upon him file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of his compliance with the order to cease and desist.

IN THE MATTER OF

TAX CORPORATION OF AMERICA (MARYLAND), ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2649. Complaint, Mar. 6, 1975 - Decision, Mar. 6, 1975

Consent order requiring a Montrose, Calif., firm engaged in the sale of personal income tax preparation services, mutual funds, lines of insurance, and individual budgeting and bill paying services, among other things to cease misrepresenting their income tax preparation services, and using tax return information for other purposes without the customer's prior consent.

Appearances

For the Commission: *Louis Rosenman.*

For the respondents: *Lawrence G. Meyer, Patton, Boggs & Blow,* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Tax Corporation of America (Maryland) and Tax Corporation of America (Delaware), corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Tax Corporation of America (Maryland) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 2441 Honolulu St., Montrose, Calif.

Respondent Tax Corporation of America (Delaware) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 2441 Honolulu St., Montrose, Calif. It is a wholly-owned subsidiary of, and is managed, directed and controlled by, respondent Tax Corporation of America (Maryland).

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, and sale of personal income tax preparation services, mutual funds, lines of insurance, individual budgeting and bill paying services to the general public.

Respondents sell their aforesaid products through various corporate subsidiaries, affiliates, and counselors, hereinafter referred to, for convenience, as respondents' representatives.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, monies, contracts, business forms and other commercial paper and printed materials, in connection with said income tax preparation, mutual funds, lines of insurance, individual budgeting and bill paying services, to be sent by United States mail from respondents' place of business in the State of California to their local offices, representatives and purchasers of respondents' products and services located in various other States of the United States, and maintain and at all times mentioned herein have maintained a substantial course of trade in said products and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents and their representatives have disseminated, and cause the dissemination of, certain advertisements concerning the said income tax preparation services by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said income tax preparation services.

PAR. 5. For the purpose of disseminating such advertisements, respondents and their representatives have employed direct mail literature, newspaper insertions, "door hangers" and point of sale promotional materials.

Typical of the statements and representations in said advertisements, but not all inclusive thereof, is the following:

> (a) Your Receipt and Triple Guarantee
>
> GUARANTEED ACCURACY: Our returns triple checked for accuracy of mathematics and reproduction. If we make an error, resulting in any penalty or interest, we will pay that penalty or interest.
>
> GUARANTEED PROTECTION: If your return is questioned by the government, we handle all details at no additional charge.
>
> (b) Please believe me when I say that the average family loses from $50 to $100 by trying to stand up to the tax law alone.
>
> (c) Tax Service In Your Home
> Computerized
> Guaranteed Accuracy
> Guaranteed Protection
> Reasonable Rates
>
> (d) Nine times out of ten, it doesn't pay to be your own tax expert, and miss valuable deductions.
>
> Of those who asked us to check out their returns, over 90% have saved much more than our low fee.

PAR. 6. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents and their representatives have represented, and are now representing, directly or by implication, that:

1. Respondents will reimburse the taxpayer for any payments the taxpayer may be required to make in addition to his initial tax payment if such additional payments result from an error made by respondents and their representatives in the preparation of the tax return.

2. If the customer's tax return is audited, respondents and their representatives are authorized and/or will provide to their customers legal representation, without charge, by persons qualified and certified by, and enrolled to practice before, the Internal Revenue Service.

3. In fact over ninety percent of respondents' tax preparation customers have saved more than the amount of the fee respondents charged by having respondents prepare their tax return.

PAR. 7. In truth and in fact:

1. Respondents and their representatives do not reimburse the taxpayer for all payments he is required to make in addition to his initial tax payment if such additional payments result from an error made by respondents and their representatives in the preparation of the tax return.

2. In instances where the customer's tax return is audited, respondents and their representatives are not authorized and are prohibited by the Internal Revenue Service from providing to their customers legal representation by persons qualified and certified by, and enrolled to practice before, the Internal Revenue Service.

3. The percentage of respondents' tax preparation customers who have saved more than the amount of the fee charged by respondents by having respondents prepare their tax returns is only an estimation and does not necessarily represent a true percentage.

Therefore, the statements and representations set forth in Paragraphs Five and Six hereof were, and are false, misleading and deceptive.

PAR. 8. In the further course and conduct of their business, respondents and their representatives enter into a relationship with their tax preparation customers which is impliedly represented as, and is inherently confidential and private in nature. As a result of the aforesaid relationship, respondents and their representatives are provided and receive certain information from their tax preparation customers. Respondents and their representatives retain a copy of the forms submitted by their representatives for each customer, on the basis of information provided by the customer, ostensibly for respondents' use in the preparation of the customer's tax return. The aforesaid forms contain private and confidential data of both a personal and financial nature for each tax preparation customer of respondents and their representatives.

Respondents and their representatives, during the initial interview with the customer and at various times subsequent thereto, make a determination as to whether they should solicit the customer for the sale of insurance, mutual funds and other services offered by respondents or other companies. On the basis of such determination respondents and their representatives solicit the tax preparation customer, either orally and in person, or by mail or telephone, for the purpose of inducing the customer to purchase insurance, mutual funds or other services.

Respondents use, and have used, the aforesaid information gathered as a result of the preparation by respondents and their representatives of their customers' income tax returns in the manner hereinabove described without the express consent of said customers, and respondents have failed to disclose such use and intended use to their customers.

PAR. 9. The aforesaid acts and practices of respondents, and the special relationship created by respondents with their customers as described in Paragraph Eight hereof, have had, and now have, the capacity and tendency to mislead respondents' customers into the erroneous and mistaken belief that the information they provided will only be used for the purpose of preparation of their income tax returns.

Therefore, the respondents' failure to disclose the use of the aforesaid information for purposes other than the preparation of their customers' tax returns is false, misleading and deceptive.

Furthermore, respondents' use of the aforesaid information for purposes other than the preparation of their customer's tax returns without the express consent of their customers is contrary to, and in substantial disregard of, the special relationship between respondents and their customers as described in Paragraph Eight hereof, and is, and was, unfair.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein, respondents and their representatives have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of income tax preparation services of the same general kind and nature.

PAR. 11. The use by respondents and their representatives of the aforesaid false, misleading and deceptive statements and representations, and unfair acts and practices, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of respondents' and their representatives' income tax preparation services by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents and their representatives as herein alleged, were and are all to the prejudice and injury of the public and of respondents' and their representatives' competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Tax Corporation of America (Maryland) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 2441 Honolulu Street, Montrose, Calif.

Respondent Tax Corporation of America (Delaware) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2441 Honolulu St., Montrose, Calif. It is a wholly-owned subsidiary of, and is managed, directed and controlled by, respondent Tax Corporation of America (Maryland).

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Tax Corporation of America (Maryland), and Tax Corporation of America (Delaware) their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary or other device, in connection with the preparation of income tax returns or the offering for sale and sale of insurance, mutual funds or any other product or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using any guarantee without clearly and conspicuously disclosing the terms, conditions and limitations of any such guarantee; or misrepresenting, in any manner, the terms and conditions of any guarantee.

2. Representing, directly or by implication, that respondents will reimburse their customers for any payments the customer may be required to make in addition to his initial tax payment, in instances where such additional payments result from an error by respondents in the preparation of the tax return; *Provided, however*, Nothing herein shall prevent truthful representations that respondents will reimburse their customers for interest or penalty payments resulting from respondents' errors.

3. Failing to disclose, clearly and conspicuously, whenever respondents make any representation, directly or by implication, as to their responsibility for, or obligation resulting from, errors attributable to respondents in the preparation of tax returns, that respondents will not assume the liability for additional taxes assessed against the taxpayer; *Provided, however*, That it shall be a defense in any enforcement proceeding for respondents to establish that they make such deficiency payments.

4. Representing, directly or by implication, that respondents will provide legal representation to customers whose tax returns may be audited; or misrepresenting, in any manner, the type or manner of assistance provided by respondents to customers whose tax returns may be audited; *Provided, however*, Nothing contained herein shall prevent truthful representations of the type or manner of assistance that respondents will provide to customers whose returns may be audited.

5. Representing, directly or by implication, the amount, or the number, or the percentage of respondents' tax preparation customers who have saved more than the amount of the fee charged by respondents and/or their representatives by having respondents prepare their tax returns; *Provided, however*, Nothing herein shall prevent truthful and substantiated representations of the savings enjoyed by respondents' tax preparation customers.

6. Failing to disclose, clearly and conspicuously, at the initial time respondents or their representatives obtain information for the preparation of the customer's tax return, that respondents also are engaged in the business of offering for sale, and sale to the general public of mutual funds, lines of insurance, individual budgeting, bill paying services, and any and all other lines of business and/or services and that respondents send, from time to time, a newsletter discussing respondents' lines of business and/or services.

7. Using any information concerning any customer of respondents or respondents' representatives including the name and/or address of the customer, obtained as a result of the preparation of the customer's tax return for any purpose which is not essential or necessary to the preparation of said tax return, without clearly and conspicuously disclosing to the customer, prior to the obtaining of any information relative to the preparation of the tax return, that respondents intend to use the information for purposes other than the preparation of the customer's return, the exact information which will be used, the particular use which will be made of such information and a description of the parties or entities to whom the information will be made available; *Provided, however*, That nothing herein shall prohibit respondents from using names and addresses only of customers for the purposes of communication with such customers solely concerning respondents' income tax preparation business.

8. Failing to provide each customer in instances where the information described in paragraph 7 hereof will be used for any purpose other than the preparation of the tax return, with a form to be signed by the customer prior to the obtaining of any such information clearly stating that respondents intend to use the information for purposes other than the preparation of the return, the exact information to be used, the particular use to be made of such information, a description of the parties or entities to whom the information will be made available, and a statement that the customer consents to the use of such information.

Nothing in the above provisions is intended to relieve respondents of any further requirements imposed on them by the Revenue Act of

1971, Pub. L. 92-178, title III, §316(a), Dec. 10, 1971; 26 U.S.C. §7216 or regulations issued pursuant to it.

It is further ordered, That:

(a) respondents herein deliver a copy of this decision and order to each of their present and future representatives and any other persons, partnerships or corporations authorized by respondents to engage in the commercial preparation of income tax returns.

(b) respondents inform each such person so described in paragraph (a) above that respondents are obligated by the terms of this order to notify the Commission of those persons, partnerships or corporations whom respondents have actual knowledge that they have continued on their own the deceptive practices prohibited by this order.

(c) respondents inform each such person or party so described in paragraph (a) that the respondents are obligated by this order to discontinue the authorization of persons or parties who continue on their own the deceptive acts or practices prohibited by this order.

It is further ordered, That respondents herein shall, within sixty (60) days after service of this order, include on the front page of the respondents' newsletter to be sent to the last known address of each of their tax preparation customers and customers of their representatives for the most recent past year, clearly and accurately explaining (1) the terms, conditions and limitations of respondents' policy regarding their responsibility for, or obligation resulting from errors attributable to respondents in preparation of tax returns; and (2) the type or manner of assistance provided by respondents to customers whose returns may be audited.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents herein shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent corporations which may affect compliance obligation arising out of this order.

IN THE MATTER OF

ROBERT N. BARNES T/A NATIONAL CREDIT EXCHANGE, ETC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FAIR CREDIT REPORTING ACTS

Docket C-2646. Complaint, Mar. 10, 1975 - Decision, Mar. 10, 1975

Consent order requiring a Canton, Ill., consumer credit reporting agency, among other things to cease violating the Fair Credit Reporting Act by furnishing credit reports to persons who do not have permissible purpose for receiving such information.

Appearances

For the Commission: *David G. Grimes, Jr.* and *Ronald G. McCauley.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Robert N. Barnes, an individual, trading and doing business as National Credit Exchange and National Fraudulent Check Bureau, hereinafter referred to as respondent, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Robert N. Barnes is an individual trading and doing business as National Credit Exchange and National Fraudulent Check Bureau, with his office and principal place of business located at 445 W. Elm St., Canton, Ill.

PAR. 2. Subsequent to Apr. 25, 1971, in the ordinary course and conduct of his business, respondent has compiled and published lists containing, among other things, the names and addresses of consumers together with statements or indications that such consumers have outstanding unpaid bills, or together with statements or indications that such consumers have issued forged checks, checks drawn upon nonexistent accounts, or checks which have been returned by the drawee bank because of insufficient funds or other reasons.

The information contained in the aforesiad lists concerning consumers whose names and addresses appear therein bears on said consumers' credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics and/or mode of living. Therefore, each of the aforesaid lists constitutes a series of consumer reports as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act.

Respondent is, and has been, for monetary fee, regularly engaged in the practice of assembling such information on consumers for the purpose of furnishing such lists to third parties, and regularly uses a means or facility of interstate commerce for the purpose of preparing and/or furnishing said lists. Therefore, respondent is a consumer reporting agency as "consumer reporting agency" is defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 3. At the time respondent furnishes the aforesaid consumer reports in list form, respondent does not have reason to believe that each person to whom the consumer reports are furnished has a legitimate business need for the information in connection with a business transaction involving each consumer reported upon, nor does respondent have reason to believe that each recipient otherwise intends to use the information for a purpose set forth in Section 604 of the Fair Credit Reporting Act. Further, the furnishing of such consumer reports is neither in response to a court order nor in accordance with the written instructions of each consumer to whom the reports relate.

Respondent, in the ordinary course and conduct of his business, as aforesaid, furnishes consumer reports to persons, as "person" is defined in Section 603(b) of the Fair Credit Reporting Act, who do not have a legitimate business need or other permissible purpose to receive the consumer reports furnished to them, as required by Section 604(3) of the Act.

By furnishing consumer reports as described above, respondent has violated and is violating Section 604 of the Fair Credit Reporting Act.

PAR. 4. By and through the acts and practices described in Paragraph Three above, respondent has failed to maintain reasonable procedures to limit the furnishing of consumer reports to the purposes listed under Section 604 of the Fair Credit Reporting Act, and has furnished consumer reports to persons under circumstances in which there are reasonable grounds for believing that such reports will not be used for a purpose listed in Section 604 of such Act. Therefore, respondent has violated and is violating Section 607(a) of the Fair Credit Reporting Act.

PAR. 5. The acts and practices set forth in Paragraphs Three and Four above, were and are in violation of the Fair Credit Reporting Act, and, pursuant to Section 621(a) of that Act, said acts and practices constitute unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, making the following jurisdictional findings, and enters the following order:

1. Respondent Robert N. Barnes is an individual trading and doing business as National Credit Exchange and National Fraudulent Check Bureau, with his office and principal place of business located at 445 W. Elm St., Canton, Ill.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Robert N. Barnes, an individual, trading and doing business as National Credit Exchange, National Fraudulent Check Bureau, or any other name or names, his successors and assigns, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the collecting, preparation, assembling and/or furnishing of consumer reports as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act (Pub. L. 91-508, 15 U.S.C. §1601, *et seq.*), shall forthwith cease and desist from:

1. Furnishing any consumer report to any person unless such report is furnished:

a. in response to the order of a court having jurisdiction to issue such order; or

b. in accordance with the written instructions of the consumer to whom the report relates; or

c. to a person which respondent then has reason to believe intends, at the time the information is furnished, to use the information:

(1) in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(2) for employment purposes; or

(3) in connection with the underwriting of insurance involving the consumer; or

(4) in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(5) in connection with a business transaction involving each consumer reported upon.

2. Furnishing consumer reports in list form, unless the identity of the consumer to whom the information relates is not disclosed on such list and cannot be determined without the use of a unique identifier, such as social security number, drivers' license number, or bank account number. The identifier used must be provided by the consumer at the time of the transaction with the user.

3. Failing to maintain reasonable procedures necessary to limit the furnishing of consumer reports to the purposes listed under Section 604 of the Act as provided by Section 607 of the Act.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the preparation and/or furnishing of consumer reports, and that respondent secure a signed statement acknowledging receipt of said order from all such personnel.

It is further ordered, That respondent promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That respondent shall, within sixty days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he had complied with this order.

IN THE MATTER OF

UNIVERSAL CREDIT ACCEPTANCE CORPORATION, ET AL.

MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8821. Decision, Feb. 16, 1973 - Modified Order, Mar. 11, 1975

Order modifying an earlier order dated February 16, 1973, 82 F.T.C. 570, 38 F.R. 7545, pursuant to order of the United States Court of Appeals for the Ninth Circuit dated Sept. 11, 1974 (503 F.2d 321), by setting aside the portions of the order which required individual respondent John Clifford Heater to make refunds of monies to certain past victims of the violations found.

Appearances

For the Commission: *Alfred Lindeman, W. T. Mitchell, William A. Arbitman* and *Harrison J. Sheppard.*

For the respondents: *Alfred L. Young,* San Mateo, Calif.

ORDER MODIFYING ORDER TO CEASE AND DESIST

Respondent John Clifford Heater having filed in the United States Court of Appeals for the Ninth Circuit on Apr. 26, 1973, a petition to review and set aside those portions of the order to cease and desist issued herein on Feb. 16, 1973, which required him to make refunds of monies to certain past victims of the violations found; and the Court having rendered its decision and entered judgment on Sept. 11, 1974, directing that the order provisions for refunds to past victims be set aside;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court to read as follows:

ORDER

It is ordered, That respondents Universal Credit Acceptance

Corporation, Continental Credit Card Corporation, International Credit Card Corporation, also trading as National Credit Service, corporations, and their officers, and John Clifford Heater, individually and as an officer of Universal Credit Acceptance Corporation and International Credit Card Corporation, and Howard P. Gingold, individually and as an officer of Continental Credit Card Corporation, and respondents' franchisees, agents, representatives, employees, successors and assigns, directly or through any corporate or other device, in connection with the advertising, offering for sale or sale of franchises or credit card services, or any other products or services, or in the operation of any credit card service or other business in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or by implication:

1. (A) Representing that franchisees will earn or can reasonably expect to earn or receive any stated or gross or net amount of earnings or profits; or representing, in any manner, the past earnings of franchisees unless in fact the past earnings represented are those of a substantial number of franchisees in the geographical area about which such representations are made and accurately reflect the average earnings of said franchisees under circumstances similar to those of the person to whom the representation is made.

(B) Representing that franchisees can expect to remain active franchisees for many years; or representing, in any manner, the longevity or tenure of past or existing franchisees unless in fact the periods of time represented are those for which a substantial number of franchisees actively pursued membership sales efforts.

(C) Selling, or offering franchises for sale, in any manner, without disclosing clearly and conspicuously in writing at or before the time of the first oral sales presentation, or in the event no oral sales presentation is made, reasonably prior to the execution of a franchise application, agreement or contract:

(i) the median and mean gross earnings from the sale of memberships in respondents' program by franchisees in the most recent calendar year (who were active for the entire year) preceding the year in which such sale or offer is made;

(ii) the total number of franchisees in the most recent calendar year preceding the year in which the sale or offer is made;

(iii) the total number of franchisees in subparagraph (ii) above who had earnings from the sale of memberships during the designated year in the following dollar amounts:

a. $1,000 or less
b. over $1,000 but not over $5,000
c. over $5,000 but not over $10,000

d. over $10,000 but not over $20,000
e. over $20,000

(iv) the number of franchisees referred to in subparagraph (ii) above who sold memberships for the following periods of time:

a. 1 year or less
b. over 1 year but not over 2 years
c. over 2 years but not over 3 years
d. over 3 years but not over 4 years
e. over 4 years

(v) the total number of members submitting credit charges in respondents' program during the most recent calendar year preceding the year in which the sale or offer is made;

(vi) the number of members referred to in subparagraph (v) above who submitted credit charges under respondents' program for the following periods of time:

a. 1 year or less
b. over 1 year but not over 2 years
c. over 2 years but not over 3 years
d. over 3 years but not over 4 years
e. over 4 years

(vii) the percentage of credit charges recoursed to members during the most recent calendar year and the full number and nature of reasons for which respondents may recourse charges;

(viii) the name and current address of each of respondents' franchisees in the most recent calendar year preceding the year in which such sale or offer is made;

(ix) a financial statement reflecting respondents' assets and liabilities (stating separately fixed assets and liquid assets) for the most recent calendar year;

(D) Selling, or offering memberships for sale, in any manner, without disclosing clearly and conspicuously in writing at or before the time of the first oral sales presentation, or in the event no oral sales presentation is made, reasonably prior to the execution of any application, agreement or contract:

(i) the percentage of credit charges recoursed to members during the most recent calendar year preceding the year in which the sale or offer is made and the full number and nature of reasons for which respondents may recourse charges;

(ii) the total number of members submitting credit charges in respondents' program during the most recent calendar year preceding the year in which the sale or offer is made;

(iii) the number of members referred to in subparagraph (ii) above who participated for the following periods of time:

a. 1 year or less
b. over 1 year but not over 2 years
c. over 2 years but not over 3 years
d. over 3 years but not over 4 years
e. over 4 years

(iv) a financial statement reflecting respondents' assets and liabilities (stating separately fixed assets and liquid assets) for the most recent calendar year.

Provided, however, That in the event respondents operated or used any corporate or trade name for a period of less than five years, the disclosures called for in this paragraph shall reflect the operations of the last preceding business entity used by respondents to sell and administer franchises and memberships.

2. Selling, or offering franchises for sale, in any manner, without furnishing to each prospective purchaser reasonably prior to the execution of a franchise application or agreement, a copy of the Federal Trade Commission Consumer Bulletin No. 4, "ADVICE FOR PERSONS WHO ARE CONSIDERING AN INVESTMENT IN A FRANCHISE BUSINESS."

3. (A) Representing that persons do not risk any loss of money in coming to respondents' offices, or any other place, for a franchise interview, or that respondents authorize the reimbursement of air fare expenses for such interviews, without disclosing clearly and conspicuously in writing prior to the expenditure of any funds by such persons, all conditions which must be met to receive reimbursement, including the exact amount of any deposit or downpayment required.

(B) Failing to reimburse travel expenses to any person respondents have promised such reimbursement.

4. Representing that persons do not risk losing the deposits or downpayments submitted with applications for franchises; or that such deposits or downpayments are refundable when such deposits or downpayments may be forfeited if the applicants withdraw or fail to pay the balance due after acceptance of their application by respondents, or for any other reason;

Provided, however, That respondents may make such representations if they do in fact refund such deposits.

5. Misrepresenting that any geographical area offered as a franchise has not been previously franchised by respondents or misrepresenting that such area has been franchised before by respondents and was profitable for the prior franchise holder.

6. Misrepresenting that respondents have a franchise committee which actually checks the qualifications of prospective franchisees, or

misrepresenting, in any manner, that respondents check, or have checked the qualifications of a prospective franchisee.

7. Misrepresenting that respondents have a regional manager who will interview, or has interviewed, prospective franchisees for a particular geographical area; or that respondents have applications pending for a particular area; or that any person must act immediately to be considered for a franchise; or misrepresenting, in any manner, the nature and extent of interest of others in any particular franchise, or franchises in general.

8. Representing that franchise holders receive substantial benefits from renewals of memberships or from annual bonuses based on a percentage of net credit charges submitted by members; or representing, in any manner, benefits to franchisees which are dependent upon the actions of members, unless the benefits represented are those received by a substantial number of franchise holders.

9. (A) Representing that persons risk losing little or nothing in investing in a franchise; or that respondents will repurchase any franchise.

(B) Representing that respondents will aid or assist in the resale of franchises without contemporaneously, clearly and conspicuously disclosing the nature of such assistance and the amount of the resale purchase price which respondents will retain.

(C) Representing that respondents' franchises are vested property rights which may be sold, assigned, transferred or testated, without contemporaneously, clearly and conspicuously disclosing that franchises are subject to termination by respondents if a franchise holder does not produce a prescribed sales quota.

10. Representing, in any manner, that respondents' program has received national acceptance, or that respondents' program can be sold with ease; or misrepresenting in any manner, the salability or degree of acceptance or approval of respondents' program.

11. (A) Representing that credit charges submitted under respondents' program are guaranteed payable or are payable without recourse; or that respondents assume the risk of nonpayment by members' customers in any manner including, but not limited to, using the terms "we honor all approved major credit cards," "honor all credit cards," "non-recourse," "without recourse" or any other terms or words of similar import or meaning.

(B) Representing that all members can expect to be successful or satisfied with the performance of respondents' program; or that members usually continue using respondents' program for two years and renew their contracts thereafter.

12. Using or disseminating any article written or prepared by

respondents and published substantially verbatim in any newspaper, magazine, or other publication.

13. Using any letter, payment check, or other materials which purport to represent the satisfaction or success of any franchisee or member unless,

(A) Such franchisee or member is actively selling or using respondents' program or service at the time such letter, payment check, or other materials are used;

(B) the full name and current address of the franchisee or member and the existence of any remuneration are disclosed clearly and conspicuously in conjunction with the use of such letter, payment check or other materials;

Provided, however, That respondents shall not obtain or use any such letter, payment check or other material relating to any franchisee or member who has not sold or participated in respondents' program or service for at least six (6) months.

14. Representing that respondents' program costs members little or nothing at all; or that the program costs members half as much as trading stamps; or misrepresenting, in any manner, the cost of respondents' program to members.

15. Representing that members complete just one simple form for all credit charges; or misrepresenting, in any manner, the procedures necessary to process credit charges and receive payment therefor; or failing to disclose contemporaneously, clearly and conspicuously any and all reasons which will preclude receipt of full payment of credit charges submitted by members.

16. Representing that members receive payment for each credit charge submitted to respondents in 30 days; or misrepresenting, in any manner, the period of time in which members will receive payment for credit charges submitted to respondents.

17. Failing to disclose clearly and conspicuously that respondents' program or service is not approved or endorsed by the individual issuers of the credit cards approved by respondents.

18. Representing that members are assured or can achieve a minimum 10 percent or any other percentage or amount of increase in business using respondents' program, without disclosing the number of members who have actually received said increase and offering to identify such members on request, and without maintaining verified statements from said members that they have received said increases.

19. (A) Using the name Fair Trade Bureau or any other name which represents that respondents' operations and activities have been endorsed by any independent or governmental organization.

(B) Writing, preparing, or disseminating any Better Business Bureau reports concerning respondents' business.

20. (A) Representing that every credit charge submitted by members is subject to the most intensive collection procedure in the credit industry; or misrepresenting, in any manner, the intensity or nature of respondents' collection activities.

(B) Using the name North American Collections or any other trade name or collection agency similarly related to respondents without disclosing contemporaneously, clearly and conspicuously that such name or agency is owned, operated or controlled by respondents.

21. Representing that respondents will institute legal action against inactive members whose accounts respondents claim are in arrears, unless respondents do intend to pursue such remedies and have in practice pursued such remedies against substantial number of members.

22. Furnishing, or otherwise placing in the hands of others, the means or instrumentalities by or through which the public may be misled or deceived in the manner or as to the things prohibited by this order.

It is further ordered, That respondents incident to selling their franchises and credit card services:

a. Inform orally all persons to whom solicitations are made and provide in writing in all applications and contracts in at least ten-point bold type that the application or contract may be cancelled for any reason by notification to respondents in writing within seven days from the date of execution.

b. Refund immediately all monies to (1) all persons who have requested cancellation of the application or contract within seven days from the execution thereof, and (2) all persons who paid any monies for franchise fees, deposits or downpayments on franchises, air fare or other expenses for a home office interview, and for membership fees, membership dues and discount fees, who show that any of respondents' solicitations, applications, contracts or performance were attended by or involved any violation of any of the provisions of this order.

It is further ordered, That the respondents shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen and franchisees or other persons engaged in the sale of respondents' franchises and services, and secure from each such salesman, franchisee or person a signed statement acknowledging receipt of said order.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That the respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That each of the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with all of the provisions of this order.

IN THE MATTER OF

UNI-SERVICE CREDIT CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2647. Complaint, Mar. 11, 1975 - Decision, Mar. 11, 1975

Consent order requiring a New Hartford, N.Y., moneylender in connection with financing of insurance premiums, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Marc A. Comras.*

For the respondents: *John P. Sullivan*, New Hartford, N.Y.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act, and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Uni-Service Credit Corp., a corporation, Insurance Pay Plan, Inc., a corporation, and John J. O'Brien, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Uni-Service Credit Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 180 Genesee St., New Hartford, N.Y.

Respondent Insurance Pay Plan, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 569 Warwick Ave., Warwick, R.I. Respondent Insurance Pay Plan, Inc. is a wholly-owned corporate subsidiary of respondent Uni-Service Credit Corp. The aforesaid respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

Respondent John J. O'Brien is an officer of each of the corporate respondents. He formulates, directs and controls the policies, acts and practices of the corporations, including the acts and practices hereinafter set forth. His address is the same as that of Uni-Service Credit Corp.

PAR. 2. Respondents are now, and for some time last past have been engaged in the business of offering to lend and lending money to the public in connection with the financing of insurance premiums.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly offer to extend consumer credit and for some time last past have regularly extended consumer credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents in the ordinary course of their business as aforesaid, and in connection with their financing of insurance premiums, which are credit sales as "credit sale" is defined in Regulation Z, have caused and are causing customers to execute a binding premium finance agreement, hereinafter referred to as the "agreement." Respondents do not provide these customers with any other consumer credit cost disclosures.

By and through the use of the agreement, respondents:

1. Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment as required by Section 226.8(c)(3) of Regulation Z.

2. Failed in some instances to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

3. Failed in some instances to disclose the annual percentage rate,

computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

4. Failed in some instances to disclose the annual percentage rate accurately to the nearest quarter of one percent in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Provided additional information which misleads or confuses the customer or obscures or detracts attention from the information required to be disclosed by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder and violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of the rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Uni-Service Credit Corp. is a corporation organized,

existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 180 Genesee St., New Hartford, N.Y.

Respondent Insurance Pay Plan, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 569 Warwick Ave., Warwick, R.I. Respondent Insurance Pay Plan, Inc., is a wholly-owned corporate subsidiary of respondent Uni-Service Credit Corp. The aforesaid respondents cooperate and work together in carrying out the acts and practices hereinafter set forth.

Respondent John J. O'Brien is an officer of said corporations. He formulates, directs and controls the policies, acts and practices of said corporations, and his principal office and place of business is located at 180 Genesee St., New Hartford, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Uni-Service Credit Corp., a corporation, its successors and assigns, and its officers, and Insurance Pay Plan, Inc., a corporation, its successors and assigns, and its officers, and John J. O'Brien, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. §1601, *et seq.*) do forthwith cease and desist from:

1. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment as required by Section 226.8(c)(3) of Regulation Z.

2. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price" as required by Section 226.8(c)(8)(ii) of Regulation Z.

3. Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

4. Failing to disclose the annual percentage rate accurately to the

nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Stating, utilizing or placing any additional information in conjunction with the disclosures required by Regulation Z to be made, which information misleads or confuses the customer, or contradicts, obscures or detracts attention from the information required by Regulation Z to be disclosed, as prohibited by Section 226.6(c) of Regulation Z.

6. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Section 226.4 and Section 226.5 of Regulation Z, at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to all present and future personnel of respondents now or hereafter engaged in the consummation of any extension of consumer credit or in any aspect of the preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

MIRIAM MASCHEK, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2648. Complaint, Mar. 11, 1975 - Decision, Mar. 11, 1975

Consent order requiring a North Miami, Fla., promoter of a chemical skin-peeling process called the "Maschek treatment," among other things to cease misrepresenting that its inherently dangerous treatment to remove facial wrinkles and blemishes is safe. Further, the order requires respondent to devote at least 15 percent of its future advertising or oral presentations to disclosure of the inherent dangers and other material facts.

Appearances

For the Commission: *Robert L. Osteen, Jr.,* and *Ronald C. Cougill.*
For the respondents: *George Gilbert,* Miami, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Miriam Maschek, Inc., a corporation, and Miriam Maschek and Francis Maschek, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated Sections 5 and 12 of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Miriam Mascheck, Inc. is a corporation organized, exiting and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 13550 Memorial Hwy., N. Miami, Fla.

Respondents Miriam Maschek and Francis Maschek are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business addresses are the same as that of the corporate respondent.

The respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents advertise, offer for sale and sell to the general public a medical process called the Maschek treatment (hereinafter sometimes referred to as respondents' treatment) which involves the application of a certain caustic chemical solution to the face, or various other parts of the bodies of their clients for the purported purpose of removing or diminishing manifestations of aging such as wrinkles, lines, folds and spots and undesirable features such as blemishes, large pores, and acne marks by peeling the upper layers of skin from the treated areas. After the solution is applied to the patient's skin, bandages are then applied to the treated areas and are allowed to remain for several days; after which time, the bandages are removed and the upper layers of skin, destroyed by the process, are peeled away.

PAR. 3. Respondents' medical treatment constitutes either a drug or a cosmetic, or both, as defined in Sections 15(c) and (e) of the Federal Trade Commission Act, 15 U.S.C. Sections 55(c) and (e).

PAR. 4. In the course and conduct of their business as aforesaid, respondents have sent and received promotional materials, agreements, business correspondence, monies and other documents by and through the United States mail between respondents' place of business in Florida and prospective patients in other States of the United States. By virtue of these activities, respondents have maintained a substantial business in commerce, as "commerce" is used in Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45. Also, respondents have disseminated and caused to be disseminated advertisements and promotional literature by and through the United States mail, and in commerce by other means, within the meaning of Section 12(a)(1) of the Federal Trade Commission Act, 15 U.S.C. Section 52(a)(1). Further, respondents' advertisements have the purpose of inducing, or are likely to induce, directly or indirectly, the purchase in commerce of the Maschek treatment, within the meaning of Section 12(a)(2) of said Act, 15 U.S.C. Section 52(a)(2).

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the purchase of their medical process, respondents have made and are now making numerous statements and representations in advertisements and other promotional materials and during oral sales presentations. Typical and illustrative of such written or oral statements and representations, but not all inclusive thereof, are the following:

> A Miami housewife, * * *, is permitting a Tribune reporter to be an eyewitness to the day-by-day miracle of taking a tuck in time-without surgery or scars.
>
> Most of them (clients) claim she turns back the clock at least 10 years and keeps it there for the next 10, which means that at 50 you can look 30; * * *
>
> Lena's new face should last for 8 to 10 years * * *
>
> In her de-aging process. * * *, the wrinkled old skin dissolves gently under the grotesque mask, and when the mask is rolled off the years roll away, leaving skin as new and pink and firm as a newborn baby's.
>
> Mrs. Maschek says her treatment has no injurious effect on beards and mustaches; the hair continues to grow while the years roll away.
>
> The droopy folds in her eyelids, and the bags under the eyes were gone. The wrinkles,

the brown spots, the laugh lines from nose to chin, the deep lines under her chin - all had vanished in the chunks of mask that came off.

"I've made women of 58 look like 35."

"It feels a little tight - just like a sunburn."

Question: Why can't her work be done on a hospital basis so more people could avail themselves of the morale lift a younger face gives? Answer: Because it is not yet approved by the medical profession.

Gray haired women come out of beauty shops every day as redheads and blondes. Why should we be so timid about changing our faces?

PAR. 6. Through the use of the above statements and representations, and others of similar import and meaning but not expressly set out herein, respondents have represented directly or by implication that:

1. Respondents' treatment is not medical or surgical in nature.

2. Respondents' treatment is generally painless and involves no abrasives or caustic chemicals.

3. The potential discomfort possibly resulting from respondents' treatment is no more severe than that normally associated with a sunburn.

4. The application of respondents' treatment is a safe procedure free from possible serious side effects or complications.

5. Respondents' treatment will eliminate or significantly diminish acne marks, big pores, deep lines, deep wrinkles and sagging or redundant folds of skin.

6. Respondents' treatment will produce or result in new, soft, fresh, clear, healthy, fine-textured skin.

7. Respondents' treatment is clinically recommended or can be beneficial to all kinds of people.

8. Respondents' personnel are competently trained and qualified to: (a) examine, advise, and mentally prepare patients to undergo the treatment; (b) determine whether each patient is a proper subject for treatment; (c) administer or perform treatment without the direction and supervision of a licensed medical practitioner; and (d) provide post-operative advice and care for patients.

9. Respondents' treatment is complete in three (3) weeks.

10. As a result of respondents' treatment, patients will appear 10, 15, or 20 years younger than their chronological age.

11. The treatment is unique, that the process is special, that it involves a secret formula, that it is available only through the respondents, and that these factors justify the high price of the treatment.

PAR. 7. In truth and in fact:

1. The treatment involves application of a caustic chemical solution (containing phenol, also known as carbolic acid) to the skin, causing a second-degree burn which peels off the outer layers of the skin and

produces a change in skin appearance solely by the body's own wound-healing processes. This treatment is known as chemosurgery and is a serious medical procedure.

2. The treatment involves caustic chemicals and creams which burn the upper layers of skin to create peeling and is in fact painful in many cases.

3. The pain associated with the said treatment can be so severe that respondents' patients are always sedated or anesthetized during the application of acid and may require medication for days, weeks, or months afterward to reduce pain and other discomforts, such as itching and burning. During the treatment, many patients experience such discomforts as the eyes swelling shut and difficulties breathing and swallowing.

4. The treatment has a number of inherent dangers to the human body:

a. *Systemic Toxic Reaction* (*Poisoning*). The chemical used in the Maschek treatment, phenol, is toxic to kidneys, liver, and other organs of the body when present in sufficient quantities. Phenol can be absorbed through the skin during the treatment in quantities sufficient to cause serious and even fatal illness in some people. Persons with kidney infections are particularly susceptible to adverse phenol reaction.

b. *Infection*. Like any other serious burn covering a large surface of the body, the danger of infection through the burned area is ever present during the process and for some time afterward. The "powder mask," worn for a week after the initial treatment is in reality a medical step to attempt to prevent infection.

c. *The Eyes*. If the acid gets in a patient's eyes, serious permanent damage can result, including blindness; therefore, a great deal of medical skill is required and adequate precautions must be taken to prevent such an occurrence and minimize the harm if this does happen.

d. *Other Systemic Complications*. Since phenol skin peeling is a serious, traumatic medical procedure and involves use of sedatives and other medications, clients are exposed to numerous other dangers, including heart disease and allergic reactions, which accompany procedures of this type. If patients are not properly prepared, physically, mentally and emotionally, with special emphasis on full disclosure of all that the process entails, these dangers are heightened and the prospects for improvement diminished.

5. Only certain limited conditions, such as fine lines and some skin blemishes, can be affected by the process, and only in carefully selected persons. Acne scars, big pores, deep lines, deep wrinkles, and sagging

or redundant folds of skin are not eliminated or significantly diminished by the treatment.

6. As a result of the treatment, a number of undesirable changes in the skin may occur, necessitating the continual use of cosmetics or medical techniques to protect the skin, or treat or camouflage its condition, including but not limited to:

a. *Scarring.* Various types of visible scars may appear after the treatment and remain indefinitely.

b. *Pigmentation Changes.* The treatment almost always produces changes in the color of the treated area, which may persist indefinitely, such as a lighter overall color, mottling (dark areas alternating with light areas), and lines of demarcation between treated and untreated areas.

c. *Redness.* The extreme redness of the skin, which occurs mainly during the healing process, may persist for a long time. Also, there may be a tendency, persisting indefinitely, for the treated skin to flush (suddenly appear red) during times of overheating, overexertion or emotional stress.

d. *Sensitivity To Sunlight.* During the healing process and for an indefinite period afterward, the treated skin may react abnormally to exposure to sunlight, including severe sunburn, mottling, and other pigmentation changes.

e. *Other Skin Reactions.* The treated skin may be affected by other problems associated with the traumatic impact of chemical skin peeling, such as increased or coarsened hair growth requiring further medical attention.

7. Favorable results cannot be achieved unless rigorous criteria for patient selection are followed, including but not limited to:

a. *Sex.* Most men should not undergo the treatment because of difficulties associated with beard growth and the necessity for wearing cosmetics to protect the skin and camouflage its condition. Yet respondents do perform the treatment on men.

b. *Age.* A young person whose skin has not matured should not go through the treatment nor should an elderly person who cannot stand the physical strain.

c. *Type Of Skin.* The treatment should only be performed on certain limited types of skin, and definitely not on dark-skinned persons because of the probability of drastic pigmentation changes.

d. *Other Factors.* People who are not in the proper physical, mental, and emotional health should not undergo this treatment.

8. Because of its serious medical nature, respondents who are not and do not employ professionally trained or licensed personnel are not

qualified to deal with the complex physical, mental, and emotional factors involved in the treatment.

9. A period lasting weeks or months, the duration of which cannot be accurately predicted, is required before the skin is healed. During this time, a treated person has an extremely red face, may suffer various discomforts, and must restrict public activities, avoid direct or reflected sunlight and use heavy cosmetics to shield and camouflage the skin.

10. Treated persons cannot reasonably expect that their appearance will be altered by more than a year or two from their actual chronological age, even with the best results obtained by a professional plastic surgeon.

11. There is nothing unique about the respondents' treatment. The process is not new or secret, but is performed by qualified plastic surgeons under more closely controlled hospital conditions in metropolitan areas across the country for a fraction of the respondents' price.

Therefore, representations referred to in Paragraph Five are false, misleading and deceptive.

PAR. 8. In the course and conduct of their business, respondents, directly or through agents, have represented in advertisements, during oral sales presentations, and at other times and places, the asserted advantages of their treatment, as hereinbefore described. The respondents, in promotional literature, have attempted to describe and depict all aspects of their treatment, but by the process of diffusion, the respondents have not effectively disclosed:

1. The treatment is chemical skin peeling, a serious medical procedure known as chemosurgery.

2. The treatment involves the application of an acid called phenol to the skin, causing a second-degree burn which peels off the outer layers of the skin and produces a change in skin appearance solely by the body's own wound-healing reactions.

3. The pain associated with the treatment can be very severe; thus patients are sedated or anesthetized during the application of acid. This pain, as well as other discomforts, such as burning, itching, and swollen shut eyes, may persist for days or weeks afterward, requiring medication to control.

4. The treatment has a number of known inherent dangers, including: (1) poisoning of a person's entire system by the acid absorbed through the skin, which can be a serious, even fatal illness; (b) infection; (c) blindness, if the acid gets into a patient's eyes; (d) permanent scarring; and (e) other complications resulting from the traumatic nature of the procedure or the medications used.

5. A number of undesirable changes in the skin result from chemical

skin-peeling, necessitating the continual use of cosmetics or medical techniques to protect, treat, or camouflage the skin. These may include: (a) permanent scarring; (b) changes in overall color of the treated area; (c) mottling; (d) a line of demarcation at the edge of the treated area; (e) extreme redness; (f) abnormal sensitivity to sunlight; (g) and other traumatic skin reactions.

6. The most common sign of aging in the neck area, which is a stringy or "turkey-neck" condition of the skin and underlying tissues, is not improved by chemical skin-peeling.

7. Almost all plastic surgeons refuse to perform chemical skin-peeling on the neck because the neck is not likely to be improved by the process and is more likely to be worsened since the risks of undesirable side effects and skin changes described above are greater.

8. Only minor aspects of skin appearance, such as fine wrinkles and some skin blemishes, can be treated by the process.

9. Acne scars, big pores, deep lines, deep wrinkles, and sagging or redundant folds of skin are not removed or significantly reduced by the process, yet some of these conditions may be improved by other techniques of plastic surgery, such as dermabrasion or surgical face-lift.

10. Most men are not advised to undergo the process because of difficulties associated with beard growth and the necessity for continual use of cosmetics.

11. A young person whose skin has not matured should not undergo the process, because of the risk of permanent skin damage.

12. Dark-skinned persons should not undergo the process because of the probability of drastic pigmentation changes.

13. Only certain kinds of people with certain types of skin have a reasonable chance of receiving favorable results and avoiding adverse effects from chemical skin-peeling, and only a licensed medical practitioner familiar with such techniques of plastic surgery and able to evaluate complex physical, mental and emotional factors is qualified to examine, diagnose, advise, select, or mentally prepare patients for chemical skin peeling, and only such a professional person can provide post-operative advice and care for patients.

14. Although a treatment of this serious nature is usually performed in a hospital, respondents apply and administer the treatment at a clinic, which they own or operate.

15. It may be weeks or months after the treatment before the skin is healed, during which time a treated person has an extremely red face, may suffer various discomforts, and must restrict public activities, avoid direct or reflected sunlight and use heavy cosmetics and sun screens.

16. If a more youthful appearance is achieved through the

treatment, the result may not last more than a year or two, since part of the benefit is due to temporary swelling and since the natural aging processes begin all over again after the treatment.

17. Chemical skin peeling is available from qualified plastic surgeons under closely controlled hospital conditions in metropolitan areas across the country at substantially lower cost.

The disadvantages, consequences and dangers described in the above Paragraph have occurred or existed, or to a reasonable medical certainty can be expected to occur or exist, and respondents knew, or had reason to know, that they could be expected to occur or exist.

Therefore, the failure to disclose the material facts referred to in Paragraph Eight is false and misleading and the acts and practices referred to in said paragraph are unfair and deceptive.

PAR. 9. In the course and conduct of their business, the respondents have been, and are now, using persons other than a licensed medical practitioner who is familiar with techniques of plastic surgery, who is operating within the limits of his or her profession and who is qualified to evaluate complex physical, mental and emotional factors, to examine, diagnose, advise, select, or mentally prepare prospective patients for the Maschek treatment, to administer or apply the treatment without supervision or direction, or to provide post-operative advice or care for them.

The use by the respondents of the aforesaid practices is an unfair act or practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 10. Therefore the advertisements, representations, acts and practices referred to hereinabove are false, misleading, unfair and deceptive.

PAR. 11. The use by respondents of the aforesaid false, misleading, unfair and deceptive representations, acts and practices has the capacity and tendency to mislead consumers into the mistaken belief that said representations are true and to unfairly influence consumers, with the result that consumers are induced to undergo the Mascheck treatment and be subjected to severe pain, discomfort, inconvenience of traveling, exorbitant charges, and risks of disease or disfigurement, without being afforded reasonable opportunity to comprehend and consider the seriousness of the treatment or to compare facial improvement treatments available from other sources under more closely controlled medical conditions, at lower prices.

PAR. 12. The respondents' acts and practices alleged herein, including the dissemination of false advertisements, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Miriam Maschek, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 13550 Memorial Hwy., N. Miami, Fla.

2. Respondents Miriam Maschek and Francis Maschek are officers of the said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above address.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Miriam Maschek, Inc., a corporation, its successors and assigns, and Miriam Maschek, and Francis Maschek, individually and as officers of said corporation (hereinafter sometimes referred to as "respondents"), and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or dispensing of the Miriam Maschek treatment (hereinafter sometimes referred to as respondents' treatment) or any similar cosmetic chemosurgical process of face lifting of skin peeling, which involves the topical application of a caustic chemical solution containing carbolic acid (also known as phenol) or other substances on the face, neck, arms, hands or other parts of the human body for the purpose of inducing superficial skin burns, the result of which is the peeling or removal of the outer layers of skin, in commerce, as "commerce" is defined in the Federal Trade Commission Act, or by the United States mails within the meaning of Section 12(a)(1) of the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing directly or by implication that:

1. Respondents' treatment or process is solely a cosmetic process, not a medical process, or does not involve chemical surgery.

2. Respondents' treatment or process is painless or involves no abrasives or caustic chemicals.

3. Potential discomfort is virtually nonexistent as one can relax without emotional or physical distress during the treatment.

4. Respondents' treatment is safe or free from possible serious side effects or complications.

5. Respondents' treatment or process will remove or significantly reduce acne scars, big pores, deep lines, deep wrinkles, or sagging, redundant folds of skin.

6. Respondents' treatment will produce or result in new soft, fresh, clear, healthy, fine textured skin.

7. Respondents' process can be clinically recommended to or safely or successfully performed on men, young people, elderly people, or dark-skinned people.

8. Respondents' personnel are competently trained and qualified to (a) examine, advise, and mentally prepare patients to undergo the treatment; (b) determine whether each patient is a proper subject for treatment; (c) administer or perform treatment without direction and supervision of a licensed medical practitioner; and (d) provide post-operative advice and care for patients.

9. Respondents' treatment is complete within any specified period of time.

10. Respondents' treatment will cause clients to appear any specified number of years younger than their actual chronological age.

11. Respondents' process is unique, new or special in the following or other ways:

a. That it involves a secret formula or secret solution;

b. That it or similar processes are only available through respondents; and

c. That it is not available through qualified plastic surgeons under more closely controlled hospital conditions in metropolitan areas across the country at a substantially lower cost.

B. Failing or refusing to make clear and conspicuous disclosures in all advertising and in all oral sales presentations, that:

1. The treatment is chemical skin-peeling, a serious medical procedure known as chemosurgery.

2. The treatment involves the application of an acid called phenol to the skin, causing a second-degree burn which peels off the outer layers of the skin and produces a change in skin appearance solely by the body's own wound-healing reactions.

3. The pain associated with the treatment can be very severe; thus patients are sedated or anesthetized during the application of acid. This pain, as well as other discomforts, such as burning itching, and swollen shut eyes, may persist for days or weeks afterward, requiring medication to control.

4. The treatment has a number of known inherent dangers, including: (a) poisoning of a person's entire system by the acid absorbed through the skin, which can be a serious, even fatal illness; (b) infection; (c) blindness, if the acid gets into a patient's eyes; (d) permanent scarring; and (e) other complications resulting from the traumatic nature of the procedure or the medications used.

5. A number of undesirable changes in the skin result from chemical skin-peeling, necessitating the continual use of cosmetics or medical techniques to protect, treat, or camouflage the skin. These may include: (a) permanent scarring; (b) changes in overall color of the treated area; (c) mottling; (d) a line of demarcation at the edge of the treated area; (e) extreme redness; (f) abnormal sensitivity to sunlight; and (g) other traumatic skin reactions.

6. The most common sign of aging in the neck area, which is a stringy or "turkey-neck" condition of the skin and underlying tissues, is not improved by chemical skin-peeling.

7. Almost all plastic surgeons refuse to perform chemical skin-peeling on the neck because the neck is not likely to be improved by the process and is more likely to be worsened since the risks of undesirable side effects and skin changes described above are greater.

8. Only minor aspects of skin appearance, such as fine wrinkles and some skin blemishes, can be treated by the process.

9. Acne scars, big pores, deep lines, deep wrinkles, and sagging or redundant folds of skin are not removed or significantly reduced by the process, yet some of these conditions may be improved by other techniques of plastic surgery, such as dermabrasion or surgical face lift.

10. Most men are not advised to undergo the process because of difficulties associated with beard growth and the necessity for continual use of cosmetics.

11. A young person whose skin has not matured should not undergo the process, because of the risk of permanent skin damage.

12. Dark-skinned persons should not undergo the process because of the probability of drastic pigmentation changes.

13. Only certain kinds of people with certain types of skin have a reasonable chance of receiving favorable results and avoiding adverse effects from chemical skin-peeling, and only a licensed medical practitioner familiar with such techniques of plastic surgery and able to evaluate complex physical, mental and emotional factors is qualified to examine, diagnose, advise, select, or mentally prepare patients for chemical skin-peeling, and only such a professional person can provide post-operative advice and care for patients.

14. Although a treatment of this serious nature is usually performed in a hospital, respondents' treatment is given at a clinic, which they own or operate.

15. It may be weeks or months after the treatment before the skin is healed, during which time a treated person has an extremely red face, may suffer various discomforts, and must restrict public activities, avoid direct or reflected sunlight and use heavy cosmetics and sun screens.

16. If a more youthful appearance is achieved through the treatment, the results may not last more than a year or two, since part of the benefit is due to temporary swelling and since the natural aging processes begin all over again after the treatment.

17. Chemical skin-peeling is available from qualified plastic surgeons under closely controlled hospital conditions in metropolitan areas across the country at substantially lower cost.

Respondents shall set forth the above disclosures separately and conspicuously from the balance of each advertisement and each presentation used in connection with the advertising, offering for sale, sale, or dispensing of respondents' cosmetic process, and shall devote no less than fifteen percent of each advertisement or presentation to such disclosures. *Provided, however*, That in advertisements which consist of less than forty-eight column inches in newspapers or periodicals, and in radio or television advertisements with a running time of two minutes or less, respondents may substitute the following statement, in lieu of the above requirements:

WARNING: This is a medical procedure-basically a chemical burn which peels skin away. It is extremely painful, takes a long time to heal, and exposes a person to risks of poisoning, infection, permanent scarring, and other medical complications. If performed on the neck, the process may make it look worse. Many signs of aging are not improved by this process, and the benefit, if any, is mainly temporary. Only certain kinds of people can benefit from this process, and they should be diagnosed, selected, treated, and continually cared for by a qualified doctor under closely controlled medical conditions (statement required by order of the Federal Trade Commission).

Respondents shall set forth the above disclosure separately and conspicuously from the balance of each advertisement, stating nothing to the contrary or in mitigation thereof, and shall devote no less than fifteen percent of each advertisement to such disclosure, and if such disclosure is made in print, it shall be in at least eleven-point type.

It is further ordered, That respondents:

1. Recall and retrieve, from each and every licensee and sales representative, all advertisements and materials upon which advertisements or oral sales presentations are based, which contain any of the representations prohibited by Paragraph A of this order or which fail to make the disclosures required by Paragraph B.

2. Deliver a copy of this order to each present and future franchisee, licensee, and sales representative, and to each licensed medical practitioner associated with respondents or their licensees; and obtain a written acknowledgement from each of the receipt thereof.

3. Obtain from each present and future franchisee, licensee, or sales representative an agreement in writing (a) to abide by the terms of this order, and (b) to the cancellation of their license or franchise for failure to do so; and that respondents cancel the license or franchise of any licensee or franchisee that fails to abide by the terms of this order.

It is further ordered, That respondents:

1. Provide prospective and present patients, as soon as possible after initial sales contact is made with such person and before such person signs any document relating to respondents' process, an information sheet which shall be furnished to the prospective patient and which contains nothing but the disclosures, numbered 1 to 17, set forth in Paragraph B. Respondents shall allow these persons ample, uninterrupted opportunity to read and consider the contents of this information sheet. Respondents shall retain a copy of this information sheet, after it is signed and dated by the person, for a period of two (2) years.

2. Require that each such prospective patient, after receipt of the information sheet described above and before he or she signs any contract for respondents' treatment, consult with a licensed physician,

who is not in any way associated with or recommended by the respondents, regarding the nature of chemical skin-peeling, its dangers, discomforts, limitations, and alternatives. Respondents shall obtain from each prospective patient a certificate, signed by the physician who was thus consulted, specifying that the physician:

a. Understands what respondents' treatment is and the conditions under which it will be performed.

b. Has explained to the prospective patient the nature of the treatment, its dangers, discomforts, limitations, and alternatives;

c. Has conducted or has examined the results of tests appropriate to determine prospective patient's physical fitness to undergo respondents' treatment and has discussed these results with the prospective patient; and

d. Has reviewed appropriate aspects of the prospective patient's medical history and has discussed these aspects with the prospective patient.

This certificate shall specify the date and approximate time of the consultation, and respondents shall retain all such certificates for three (3) years.

It is further ordered, That no contract for respondents' process shall become binding on the patient prior to forty-eight hours after the patient has consulted with the physician who will direct and supervise the performing of the treatment and inspected and approved the treatment and recuperation facilities, and that:

1. Respondents shall clearly and conspicuously disclose, orally prior to the time of sale, and in writing on any contract, promissory note or other instrument signed by the patient, that the purchaser may rescind or cancel any obligation incurred, with return of all monies paid, by mailing or delivering a notice of cancellation to the respondents' place of business prior to the end of this period.

2. Respondents shall provide a separate and clearly understandable form which the purchaser may use as a notice of cancellation.

3. Respondents shall return to such patient, within forty-eight hours after receipt of notice of cancellation, all monies paid.

4. Respondents shall not negotiate any contract, promissory note, or other instrument of indebtedness to a finance company or other third party prior to the time the patient is treated.

It is further ordered, That respondents cease and desist from the following unfair practice:

1. Failing or refusing to use a licensed medical practitioner, who is familiar with such techniques of plastic surgery, who is operating within the limits of his or her profession, and who is qualified to evaluate complex physical, mental and emotional factors, to examine,

diagnose, advise, select, or mentally prepare all prospective patients for chemical skin-peeling, to supervise and direct all administrations or applications of the treatment, and to provide post-operative advice or care for all such patients.

It is further ordered, That respondents maintain at all times in the future, for a period of not less than three (3) years, complete business records relative to the manner and form of their continuing compliance with the above terms and provisions of this order.

It is further ordered, That the corporate respondent notify the Commission at least thirty (30) days prior to any proposed change in said respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, licensees, or franchisees, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment, and affiliation with a new business or employment, in the event of such discontinuance or affiliation. Such notice shall include individual's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

DELTOWN FOODS, INCORPORATED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 8951. Complaint, Jan. 18, 1974 - Decision, Mar. 14, 1975

Consent order requiring a Yonkers, N.Y., producer of packaged fluid milk, among other things to divest itself of the milk processing plant in New York City that it purchased from Kraftco Corp., in Nov., 1973, and also to divest one-half of the acquired customer volume. Further, the order places a ten-year ban on future acquisitions by respondent of fluid milk processing facilities without prior Commission approval.

Appearances

For the Commission: *John J. Mathias, Peter Brickfield* and *Alan I. Leibowitz.*

For the respondents: *Bruce L. Montgomery, Arnold & Porter,* Wash., D. C., *Howard T. Milman, Sullivan & Cromwell,* New York City, *Sydney C. Winton, Botein, Hays, Sklar & Herzberg,* New York City and *J. M. Costigan,* Glenview, Ill.

COMPLAINT

The Federal Trade Commission, having reason to believe that Deltown Foods, Inc., (hereinafter "Deltown") and Kraftco Corp. (hereinafter "Kraftco") have violated the provisions of Section 7 of the Clayton Act (15 U.S.C. §18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) through the acquisition by Deltown of certain Kraftco assets and intangible rights, and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

I

Definitions

1. For the purposes of this complaint, the following definitions are applicable:

(a) "Packaged fluid milk" consists of milk and other packaged milk and related products, such as whole milk, skim milk, cream, half & half and other products referred to as Class I milk products in the Federal Milk Marketing Order applicable to the New York City Metropolitan District.

(b) The "New York City Metropolitan District" consists of the five boroughs of New York City and Nassau, Suffolk, Westchester and Rockland Counties of the State of New York, or portions thereof.

II

Respondents

2. Respondent Deltown is a corporation organized and existing under the laws of the State of New York with its office and principal place of business at 170 Saw Mill River Rd., Yonkers, N.Y.

3. Deltown, directly and through various wholly-owned subsidiaries, is a large producer of packaged fluid milk in the New York City area. The company operates two dairy products plants and distributes its milk throughout the New York City Metropolitan District. Prior to the

acquisition described hereinbelow, Deltown was approximately the fourth largest dairy in the New York City Metropolitan District with about 11 percent of the market.

4. Respondent Kraftco is a corporation organized and existing under the laws of the State of Delaware with its office and principal place of business at Kraftco Court, Glenview, Ill.

5. Kraftco, directly and through various wholly-owned subsidiaries or divisions, is a large national producer of packaged fluid milk and other dairy products and nondairy food products. Kraftco owns dairy plants throughout the eastern half of the country and distributes packaged fluid milk in various parts of the country, including until recently the New York City Metropolitan District. Kraftco has trademarked and heavily promoted the "Sealtest" and "Light 'n Lively" labels, the latter applicable to products of low fat content. Kraftco was approximately the sixth largest dairy in the New York City Metropolitan District with about 8 percent of the market.

6. Respondents Kraftco and Deltown are and for many years have been engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts.

III

Trade and Commerce

7. The packaged fluid milk industry consists of dairies primarily engaged in the processing and distribution of fresh whole milk and packaged fluid milk.

8. Packaged fluid milk is sold by dairies (1) to retail food stores for resale, (2) to institutions, (3) direct to homes, (4) to jobbers. Sales by dairies to retail stores and institutions represent "wholesale" sales. Sales by dairies directly to homes represent retail sales.

9. The New York City Metropolitan District is one of the largest markets in the United States for the consumption of packaged fluid milk.

10. Prior to the acquisition described hereinbelow, the four largest dairy companies in the New York City Metropolitan District accounted for 45.9 percent of the sales of packaged fluid milk. The top eight companies accounted for 71.5 percent of sales of packaged fluid milk.

11. In 1972, Kraftco, including its Muller Dairy division, was one of the largest distributors of packaged fluid milk in the New York City Metropolitan District with approximately 8-10 percent of the market. Sealtest sold packaged fluid milk in high volume to several food chains and, in addition, served almost every chainstore in the New York area with its low fat Light 'n Lively trademarked milk.

12. In 1972, Deltown was also one of the largest distributors of packaged fluid milk in the New York City Metropolitan District with 10-11 percent of the market. It was a supplier to the A&P stores in Manhattan and the Bronx, to part of the Food Fair retail chain in the New York City Metropolitan District and supplied numerous small retail food chains.

13. Wholesale packaged fluid milk sales, especially sales to supermarkets, are highly sought after by the large dairy companies in the New York City Metropolitan District. Because such business produces a high volume of sales, supermarket chains are regarded as choice outlets and essential for successful operation of the larger dairies. In the New York City Metropolitan District, competition for retail food store chains has been vigorous and the business of the various chains has been awarded to eight or nine dairy companies. These dairies are relatively closely bunched in terms of size and share of market, no single dairy being dominant.

14. Over the past several years, the number of fluid milk processors active in the New York City Metropolitan District has decreased from 35 in 1966 to 23 in 1973.

IV

Violations Charged

15. On or about Nov. 11, 1973, Deltown and Kraftco entered into an agreement, whereby Kraftco would sell to Deltown its plants, equipment, and other assets located in New York City, including its Muller Dairy division. In addition, a separate agreement provides that Deltown will be able to use the "Sealtest" and "Light 'n Lively" trademark and trade names in the sale of packaged fluid milk.

16. The effect of Deltown's acquisition of the Kraftco assets in New York City may be to lessen competition substantially or tend to create a monopoly in violation of Section 7 of the Clayton Act, and the contract and combination by which Kraftco and Deltown undertook to eliminate the independent competition of Kraftco and entrench Deltown as dominant in the market is in unreasonable restraint of trade, and may hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act, in that:

(a) Actual or potential competition in sale and distribution of packaged fluid milk in the New York City Metropolitan District will be eliminated or prevented;

(b) Deltown will become the dominant competitive factor in a market now noted for competitors of relatively equal size, none of whom has a commanding market share in the New York City Metropolitan District;

(c) Concentration in the sale and distribution of packaged fluid milk in the New York City Metropolitan District will be increased and deconcentration will be prevented;

(d) Deltown, now possessing the "Sealtest" and "Light 'n Lively," trademarks for which there is high consumer demand, will be in a position to force competing dairies out of retail chains by convincing store managers that the stores, already being served with "Light 'n Lively," do not need a different dairy supplier for other packaged fluid milk products;

(e) The New York City Metropolitan District, which has witnessed vigorous competition between dairies, will become dominated by the Deltown-Kraftco combination, thereby reducing the competitive atmosphere in the market area and threatening the elimination of competitors who are not able to maintain their present sales contracts with retail store chains.

(f) The members of the consuming public in the New York City Metropolitan District will be denied the benefits of free and open competition in the sale and distribution of packaged fluid milk.

Notice of Contemplated Relief

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that the respondents Deltown and Kraftco are in violation of Section 5 of the Federal Trade Commission Act and/or Section 7 of the Clayton Act as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate including, but not limited to:

1. Divestiture of ownership of all former Kraftco stock, assets and other property in the New York City Metropolitan District owned or under the control of Deltown or total rescission of the agreement or contract of purchase and sale entered into between Deltown and Kraftco.
2. Revocation of Kraftco's license to Deltown to use Kraftco's trademarks "Sealtest" and "Light 'n Lively" to Deltown, such licenses must be granted on a nonexclusive basis and made available to all dairies in the New York City Metropolitan District on the same reasonable terms.
3. Any other provisions appropriate to correct or remedy the effects of anticompetitive practices engaged in by respondent.
4. Requirement that appropriate persons be notified of the terms of the order and that periodic compliance reports be filed with the Commission.

DECISION AND ORDER

The Federal Trade Commission, having initiated a complaint charging that the respondents named in the caption hereof have violated the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. §18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. §45; and

Upon joint motion of the parties and certification of such motion to the Commission by the administrative law judge, the Commission, by order of Dec. 5, 1974, having withdrawn the matter from adjudication pursuant to Section 2.34(d) of the rules of practice; and

Respondents and complaint counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted it by unanimous vote on Dec. 17, 1974, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and no comments having been filed pursuant to Section 2.34(b) of the rules;

Now, in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Deltown Foods, Incorporated (Deltown) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive offices and prinicipal place of business located at 170 Saw Mill River Road, Yonkers, N.Y.

2. Respondent Kraftco Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Kraftco Court, Glenview, Ill.

3. The Federal Trade Commission has jurisdiction of this proceeding and of the respondents, and this proceeding is in the public interest.

ORDER

I

For the purposes of this order, the following definitions shall apply:

A. The "Base Period" is the six day period Nov. 12 to Nov. 17, 1973, both dates inclusive.

B. The "Plant" is the milk processing plant located at 132-05 Atlantic Ave., Richmond Hill, Queens, N.Y.

C. An "Acquired Customer" is any customer who "bought or obtained" "Class I Packaged Fluid Milk Products" from the "Plant" on Nov. 12, 1973. An "Acquired Customer" is a particular store, delivery stop or plant pick up rather than the purchasing entity as a whole; "bought or obtained" shall include milk of customers in quarts or quart equivalents processed or packaged for their account.

D. "Acquired Volume" is the total volume of "Class I Packaged Fluid Milk Products" in quarts or quart equivalents "bought or obtained" from the "Plant" by an "Acquired Customer" during the "Base Period."

E. "Class I Packaged Fluid Milk Products" consist of whole milk, skim milk, 1 percent low-fat milk and all other products defined as Class I milk products for the purposes of Federal Milk Marketing Order No. 2.

F. "Volume Discontinued" is the total volume of "Class I Packaged Fluid Milk Products," in quarts or quart equivalents, "bought or obtained" by a discontinued "Acquired Customer" during the "Base Period" from the "Plant" or from Deltown's processing facilities in Yonkers, N.Y. or Copiague, N.Y. A discontinued "Acquired Customer" shall be any "Acquired Customer" with respect to whom service has been discontinued for any reason on or after Nov. 13, 1973.

II

It is ordered, That the Trademark License Agreement dated Nov. 20, 1973, between Sealtest Foods Division of Kraftco Corporation and Deltown Foods, Incorporated, (License Agreement) and all rights and interests thereunder, (except for the obligations of Deltown set forth in paragraphs 5(d), 8, 9, 10, 15(b), including the last sentence of 15, 16 and 17 of the license agreement, the obligation of Deltown pursuant to paragraph 6 of the License Agreement to pay royalties on sales made prior to the date of termination, and the obligations of Kraftco set forth in paragraph 13 of the license agreement), shall terminate on Mar. 31, 1976, unless Deltown shall, on or before Mar. 31, 1976, the exact date to be as determined by Deltown, assign its right and interest as licensee of the trademarks "Sealtest" and "Light 'n Lively," to a purchaser previously approved by Kraftco pursuant to the license agreement and approved by the Federal Trade Commission (the "Commission").

III

It is further ordered, That Deltown, on or before Mar. 31, 1976, the exact date or dates to be determined by Deltown, shall have ceased service to "Acquired Customers" in sufficient number such that the total "Volume Discontinued" is not less than one-half (1/2) of the "Acquired Volume." Discontinuance or cessation of service may have been effected for any reason including, without limitation, sale (for monetary consideration) of the patronage of such "Acquired Customers" to a purchaser or purchasers other than Dairylea Cooperative Inc., Pearl River, N.Y., hereinafter "Dairylea," Elmhurst Milk and Cream Co./Honeywell Farms Inc., 155-25 Styler Rd., Jamaica, N.Y., hereinafter "Elmhurst/Honeywell," Queens Farms Inc./Liberty Farms Inc., 103-45 98th Street, Ozone Park, N.Y., hereinafter "Queens Farms/Liberty Farms" or their parents, divisions, affiliates or related companies; *Provided*, That any discontinuance of service as part of a swap or exchange of customers' patronage shall not be considered to be a discontinuance within the meaning of this order. Deltown shall maintain, until Jan. 1, 1979, and make available upon request by the Commission staff, sufficient records to reflect the identity of "Acquired Customer" and sufficient records from which "Volume Discontinued" can be calculated.

IV

It is further ordered, That Deltown shall file an Initial Report as hereinafter provided and thereafter shall file successive reports for each calendar quarter to and including the quarter ending Mar. 31, 1976, identifying "Acquired Customers" whose patronage has been discontinued during the reporting quarter and identifying any wholesale customers acquired in the reporting quarter and such customer's previous supplier and, in the case of customers whose patronage was sold, stating to whom such customer's patronage was sold and the consideration therefor. Sixty days after this order shall become effective, Deltown shall file its Initial Report covering all calendar quarters since Nov. 12, 1973, to and including the calendar quarter ending on or before the date of the Initial Report. For a period of one year after the filing of the quarterly report identifying a discontinued "Acquired Customer," or in the case of the Initial Report, one year after the end of the quarter during which the "Acquired Customer" was reported as discontinued, Deltown shall not solicit, canvass, sell to or in any other way attempt to obtain the patronage or business of the "Acquired Customer" listed as discontinued on such quarterly or Initial Report. Deltown shall, if requested, file such additional reports as may be required by the Commission's staff on reasonable notice.

V

It is further ordered, That Deltown shall divest itself of the "Plant" no later than Mar. 31, 1975, *Provided,* That it shall be deemed sufficient divestiture hereunder if Deltown takes such actions, including but not limited to a sale or lease, the effect of which shall be that Deltown no longer operates that "Plant" as a milk processing facility; *Provided,* That any sale or lease to a firm engaged in processing and/or distribution of "Class I Packaged Fluid Milk Products" shall have prior Commission approval.

Nothing in this order shall be deemed to prohibit Deltown from retaining, accepting and enforcing in good faith any security interest in the "Plant" or equipment contained therein for the sole purpose of securing to Deltown full payment, with interest, of the price at which the "Plant" or equipment is sold.

VI

It is further ordered, That for a period of ten years from the effective date of this order, Deltown shall be prohibited from acquiring, directly or indirectly, without the prior approval of the Commission, (1) the whole or any part of the stock or share capital of any corporation or other business entity engaged in the processing and/or distribution of "Class I Packaged Fluid Milk Products" within the five boroughs of New York City and Nassau, Suffolk and Westchester Counties, in the State of New York, (the "New York City Metropolitan District"), or (2) a fluid milk processing plant or fluid milk distribution route of any corporation or other business entity if such plant or route is involved in the processing and/or distribution of "Class I Packaged Fluid Milk Products" in the "New York City Metropolitan District"; *Provided, however,* That subject to the provisions in subdivision IV, *supra,* as to discontinued "Acquired Customers," nothing contained herein shall prohibit Deltown from competing for the sale or processing of "Class I Packaged Fluid Milk Products" to or for dealers or jobbers whether or not served by Deltown on the date this order becomes final; *And provided further,* that Deltown may, without prior approval of the Commission, acquire the whole or any part of the stock, share capital or assets of any concern to which it may be selling or for which it may be processing "Class I Packaged Fluid Milk Products" to prevent loss of accounts receivable owing from such concern; *Provided,* That Deltown shall, within ten (10) days after such acquisition, report the transaction to the Commission, thereafter provide such information concerning the acquisition as may be required by the Commission's staff, and shall, if so required by the Commission, divest such acquired tangible and/or intangible property within six months of the Commission's decision. Deltown shall be further prohibited for a period of ten years from acquiring, directly or indirectly, without the prior approval of the Commission, any fluid milk processing plant within 150 miles of New York City which processed 26 million pounds of milk in the twelve (12) months prior to the proposed acquisition.

VII

It is further ordered, That prior to Jan. 1, 1979, Kraftco shall not:

A. enter into any agreement which has the effect of:

(i) licensing anyone to process and distribute; or

(ii) authorizing "Dairylea," Deltown Foods, Inc., "Elmhurst/Honeywell," "Queens Farms/Liberty Farms" or their parents, divisions, affiliates or related companies to process; or

(iii) authorizing any one person or company or its parents, divisions, affiliates or related companies to distribute; or

(iv) authorizing less than five persons or companies or their parents, divisions, affiliates or related companies if any of them are "Dairylea," Deltown Foods, Inc., "Elmhurst/Honeywell" or "Queens Farms/Liberty Farms" to distribute;

"Light 'n Lively" or "Sealtest" "Class I Packaged Fluid Milk Products" in the "New York City Metropolitan District" until thirty (30) days after the Commission receives either a copy of the proposed agreement (in the case of a written agreement) or has been notified in writing of the substance of the agreement (in the case of an oral agreement).

B. enter into any agreement not covered by paragraph A above which results in the sale of "Light 'n Lively" or "Sealtest" "Class I Packaged Fluid Milk Products" in the "New York City Metropolitan District" unless the Commission receives either a copy of the agreement (in the case of a written agreement) or has been notified in writing of the substance of the agreement (in the case of an oral agreement) within ten (10) days of said agreement.

C. *Provided, however*, That in the event that a then existing processor is unable to process "Light 'n Lively" or "Sealtest" "Class I Packaged Fluid Milk Products" in the "New York City Metropolitan District" Kraftco may enter into an agreement for emergency processing for a period not to exceed sixty (60) days; *Provided*, That the Commission is notified within forty-eight (48) hours of the entering into of such agreement.

IN THE MATTER OF

CAMBRIDGE CAMERA EXCHANGE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8971. Complaint, June 10, 1974 - Decision, Mar. 17, 1975

Consent order requiring a New York City mail-order distributor of photographic equipment and supplies, among other things to cease using unfair and deceptive practices in connection with the delivery of prepaid mail order merchandise.

Appearances

For the Commission: *Larry B. Feinstein* and *Herbert S. Forsmith.*

For the respondents: *Harvey M. Greene, Lotwin, Goldman, Rosen & Greene,* New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Cambridge Camera Exchange, Inc., a corporation, Andrew Elbogen, individually, and as an officer of said corporation, and Robert Lindenblatt, individually, and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Cambridge Camera Exchange, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of New York, with its principal place of business and executive offices located at 47 Seventh Ave., N.Y., N.Y.

PAR. 2. Andrew Elbogen is an individual and is president of the corporate respondent, and formulates, directs and controls its acts and practices, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 3. Robert Lindenblatt is an individual and is the vice president of the corporate respondent, and formulates, directs and controls its acts and practices, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 4. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, and distribution by mail order of photographic equipment and supplies.

PAR. 5. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their photographic equipment and supplies, when sold, to be shipped from their place of business in the State of New York to purchasers located in the various States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. In the course and conduct of their business, and for the purpose of inducing sale of said merchandise, respondents have made, and are now making, certain statements and representations in various newspaper and magazine advertisements, direct mail circulars and by other means in commerce, as "commerce" is defined by the Federal Trade Commission Act, with respect to the time in which delivery of said merchandise may be expected.

Typical and illustrative of the foregoing, but not all inclusive thereof, are the following statements:

(a) "RUSH ORDER FORM," (printed above a clip-coupon order form).

(b) "Fast Shipment."

(c) "Prompt Shipment."

PAR. 7. By and through the use of the above-quoted statements and representations, and others of similar import and meaning not expressly set out herein, respondents have represented, and are now representing, directly and by implication that all orders are promptly shipped upon receipt of an order, or within a reasonable time thereof.

PAR. 8. In truth and in fact, respondents on numerous occasions and in a substantial number of instances, either have failed to deliver merchandise or have delivered merchandise only after a long lapse of time and/or after several demands thereof have been made to respondents and pleas for assistance have been made to Better Business Bureaus, United States Postal Inspectors' Offices, the magazines respondents advertise in, and to government agencies. Such practices have resulted in substantial expense and inconvenience, hardship, outrage and irritation to purchasers.

Therefore, said practices, statements and representations were and are unfair, misleading and deceptive.

PAR. 9. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, have had, and now have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the order and purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. In the conduct of their aforesaid business and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals engaged in the advertising, offering for sale, and the sale of merchandise of the same general kind and nature as that advertised, offered, and sold by the respondent.

PAR. 11. The acts and practices of the respondents as set forth above were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on June 10, 1974, charging respondents named in the caption hereof with violation of the Federal Trade Commission Act, and respondents having been served with a copy of that complaint; and

The Commission having withdrawn the matter from adjudication for the purpose of negotiating a settlement by entry of a consent order; and

Respondents and counsel for the complaint having thereafter executed an agreement containing a consent order, an admission by respondents of all jurisdictional facts set forth in the complaint, a statement that the signing of the agreement by respondents is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, and having thereupon placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter, now, in further conformity with the procedure prescribed in its rules, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered;

1. Respondent Cambridge Camera Exchange, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of New York, with its principal place of business and executive offices located at 47 Seventh Ave., N.Y., N.Y.

2. Respondent Andrew Elbogen is an individual and is president of the corporate respondent, and formulates, directs and controls its acts and practices. His address is the same as that of the corporate respondent.

3. Respondent Robert Lindenblatt is an individual and is the vice president of the corporate respondent, and formulates, directs and controls its acts and practices. His address is the same as that of the corporate respondent.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents, Cambridge Camera Exchange, Inc., a corporation, its successors and assigns and its officers, and Andrew Elbogen and Robert Lindenblatt, individually and as officers of said corporation, and respondents' agents, representatives, and employees directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution of photographic equipment and supplies or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

(1) Soliciting orders for sales of merchandise to be ordered by the buyer through the mail on a prepaid basis unless such merchandise will be shipped within that time clearly and conspicuously stated in such solicitation or if no time is stated, within thirty (30) days after receipt of payment and a properly completed order from the buyer.

(2) Failing to offer in writing, if shipment is not made within the said period, to promptly refund the full purchase price therefor to the purchaser. Upon request for said refund, the return of the purchase price shall be made within ten (10) business days from the date of the receipt of said written request.

That where the respondents, due to circumstances beyond their control, are unable to make shipment as required by paragraph (1), paragraph (2) may be complied with by the respondents furnishing a definite shipping date for the merchandise and by the respondents sending to the buyer a notice of delayed shipment providing the buyer with the opportunity to express his choice whether to cancel his order and receive a refund or be shipped the merchandise by a specified later date. The notice shall be sent by first class mail and accompanied by a self-addressed, postage paid device upon which the buyer may indicate his choice, and mailed by the expiration of the thirty (30) day period, or that time stated in the solicitation as the time within which shipment would have been made. If, at any time prior to shipment, the respondents receive a response from the buyer requesting refund, such refund shall be made within ten (10) business days from receipt of said request.

(3) Failing:

(a) to maintain a record of each complaint alleging failure to ship merchandise solicited and ordered on a prepaid basis, or of failure to make a refund within the applicable period of time specified in paragraph (2) above, and the disposition of each such complaint. Such record shall be kept for a period of at least twelve (12) months following the disposition of such complaint.

(b) to maintain records showing the employment of systems and procedures designed to comply with paragraphs (1) and (2).

Wherever in this order the term "receipt of payment" is used, it shall be deemed to be (1) at the time the respondents receive the mail-order with payment enclosed either in cash or by money order, (2) at the time the respondents charge a buyer's account for a credit order, or (3) if payment is made by check, at the time the said check clears the buyer's bank.

It is further ordered, That nothing contained in this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt from complying with agreements, orders or directives of any kind obtained by other agencies or act as a defense to actions instituted by municipal or State regulatory agencies.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That each individual respondent named herein promptly notify the Commission in the event that he discontinues his present business or employment, and becomes affiliated with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That respondents herein shall forthwith distribute a copy of this order to each of their operating officers, agents and representatives.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

C.E.B. PRODUCTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2650. Complaint, Mar. 17, 1975 - Decision, Mar. 17, 1975

Consent order requiring a Chicago, Ill., cosmetic manufacturer, among other things to cease advertising and packaging "Dark-Eyes Lash and Brow Tint" without a warning to consumers that the product can cause severe pain to the eye for a substantial period of time. Further, the order requires that all existing packages of the product not yet sold to the public and all point-of-purchase displays either be corrected so as to prominently display the required warning or be recalled by respondent.

Appearances

For the Commission: *Marvin R. Lange* and *Stewart A. Block.*

For the respondents: *R. Quincy White* and *Jack Bierig, Sidley & Austin,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that C.E.B. Products, Inc., a corporation, and Charlotte E. Barth and Herman Goldenberg, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

1. "Commerce" means commerce as defined in the Federal Trade Commission Act;

2. "False advertisement" means false advertisement as defined in the Federal Trade Commission Act;

3. "Dark-Eyes" means the product "Dark-Eyes Lash and Brow Tint" in each formulation in which it is packaged and sold to the public.

4. "Product package" means the package in which "Dark-Eyes Lash and Brow Tint" is contained and sold.

PAR. 2. Respondent C.E.B. Products, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7115 Ridge Blvd., Chicago, Ill.

Respondent Charlotte E. Barth is an officer of C.E.B. Products, Inc. She formulates, directs, and controls the acts and practices of the corporate respondent C.E.B. Products, Inc., including the acts and practices hereinafter set forth. Her address is the same as that of C.E.B. Products, Inc.

Respondent Herman Goldenberg is an officer of C.E.B. Products, Inc. He participates in the formulation, direction, and control of the acts and practices of the corporate respondent C.E.B. Products, Inc., including the acts and practices hereinafter set forth. His address is the same as that of C.E.B. Products, Inc.

PAR. 3. Respondent C.E.B. Products, Inc., is now, and for all times relevant to this complaint has been, engaged in the manufacturing, advertising, offering for sale, sale, and distribution of a liquid eyelash and eyebrow darkener designated as "Dark-Eyes Lash and Brow Tint." Said product is a "cosmetic" as that term is defined in Section 15 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its aforesaid business, respondent C.E.B. Products, Inc., causes "Dark-Eyes" contained in its product package to be transported from its place of business to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent C.E.B. Products, Inc., maintains and at all times mentioned herein has maintained, a substantial course of trade in said product in commerce. The volume of business in commerce has been and is substantial.

PAR. 5. In the course and conduct of their aforesaid business, respondents have disseminated, or have caused to be disseminated, in commerce, advertisements for the purpose of inducing, or which are likely to induce, the purchase of "Dark-Eyes," and have disseminated or have caused to be disseminated advertisements for the purpose of inducing, or which are likely to induce, the purchase, in commerce, of "Dark-Eyes."

PAR. 6. Among the advertisements disseminated by means of television, but not all inclusive thereof, are the following:

A. EICOFF & COMPANY

advertising · marketing · 520 N. MICHIGAN AVE. · CHICAGO, ILLINOIS 60611
PHONE (312) 944 2300

1.	*Open on MLS of two women in bedroom. Daughter opens box with wedding dress and holds up for mother to see.*	1.	*When a woman cries... You never really know...*
2.	*Cut to CU of mother crying.*	2.	*She could be happy...or sad.*
3.	*Cut MS of girl, who also starts crying.*	3.	*But then, that's what makes her a woman...and that makes her all the more beautiful.*
4.	*Zoom to CU of girl's face to show how tears have made mascara run down her face.*	4.	*Except if those tears make her mascara run. She can't stop those tears.*
5.	*Cut to MLS as Mother hands tissue to girl who dabs away tears.*	5.	*but she should have used the unique eye make-up that won't run, smear, wash off, or even cry off for weeks and weeks.*
6.	*Diss. to CU of Dark Eyes Pkg. chromakeyed over a calendar. SUPER: The Once-A-Month Eye Make-Up.*	6.	*It's called DARK EYES. DARK EYES is not a mascara...It's a once-a-month eye cosmetic tint that could save you lots of tedious make-up time each week.*
7.	*Diss. to MCU of girl lightly dabbing vaseline on eyes and above brows.*	7.	*Here's what you do. First, apply a little vaseline around your eyes.*
8.	*Diss. to display of pkg. and bottles. Hand enters and dips brush into cap filled with liquid.*	8.	*Then simply brush your lashes gently with DARK EYES # 1.*
9.	*Cut to CU as girl applies Dark Eyes to lashes.*	9.	*and let dry for a few minutes.*
10.	*Diss. to CU of girl's eyes as she applies Dark Eyes # 2... then wipes with cotton ball.*	10.	*Now, brush them again with DARK EYES # 2 and wipe with a moist cotton ball. That's all there is to it.*
11.	*Diss. to girl applying Dark Eyes to brows.*	11.	*For eyebrows, apply DARK EYES the same way.*
12.	*Diss. to same girl in shower. Zoom into CU of eyes.*	12.	*Now, go ahead and shower...even go swimming as often as you like...DARK EYES won't wash off.*
13.	*Diss. to CU of same girl using cream on face.*	13.	*And, don't hesitate to cream your face...DARK EYES won't cream off.*
14.	*Diss. to same girl in bed, just awakening.*	14.	*But best yet, when you use DARK EYES you'll wake up pretty every single morning.*
15.	*Diss. to CU display of product. SUPER: The Once-A-Month Eye Make-Up. also SUPER: $2.00*	15.	*This complete DARK EYES kit will keep your eyes beautiful month after month...and it costs only $2.00.*
16.	*Diss. to wedding scene in church. CU of bride and groom. Groom lifts veil, camera zooms to CU of girls face to show tears on cheek.*	16.	*So get DARK EYES today--the once-a-month eye make-up that won't run, smear, wash off, cream off or even cry off.*

A. EICOFF & COMPANY

advertising · marketing · 520 N. MICHIGAN AVE. · CHICAGO, ILLINOIS 60611
PHONE (312) 944 2300

1.	*MS of man and woman in romantic dinner table setting with candlelight. Man hands woman engagement ring.*	1.	*It's the moment you've waited for... and you wanted to look your loveliest. A romantic candlelight dinner...and now, you're engaged.*
2.	*Cut to CU of girl's face. She's weeping tears of joy and mascara is streaking.*	2.	*But just look at you...with your mascara running down your face.*
3.	*Cut back to MS as man hands woman his handkerchief and she dabs at her eyes.*	3.	*You can't stop those happy tears, but you should have used the amazing eye make-up that won't run, smear, wash off, or even cry off for weeks and weeks.*
4.	*Diss to CU of Dark Eyes pkg chromakeyed over calendar page. Super: The Once-a-month eye make-up.*	4.	*It's called DARK EYES. DARK EYES is not a mascara..it's a Once-A-Month eye make-up that will save you hours of tense make-up time each week.*
5.	*Diss to display of pkg and bottles. Hand enters scene and dips brush into cap filled with liquid.*	5.	*Just a few minutes ONCE A MONTH with DARK EYES and your eyes will stay beautiful, no matter what you do.*
6.	*Cut to CU of girl's eyes as she applies Dark Eyes to her eyelashes.*	6.	*Here's how it works. Simply brush your lashes gently with DARK EYES # 1 and let dry for a few minutes.*
7.	*Diss to CU of girl's eyes as she applies Dark Eyes # 2...then wipes with cotton ball.*	7.	*Then brush them again with DARK EYES # 2 and wipe with a moist cotton ball. It's that easy.*
8.	*Girl applies Dark Eyes to her eyebrows.*	8.	*For eyebrows, apply DARK EYES the same way.*
9.	*Diss to same girl in shower. Zoom to CU of eyes.*	9.	*Now, go ahead and shower...even go swimming...as often as you like... DARK EYES won't wash off.*
10.	*Diss to CU of same girl using cream on face.*	10.	*And don't hesitate to cream your face...DARK EYES won't even cream off.*
11.	*Diss to same girl in bed just awakening.*	11.	*But best yet, with DARK EYES you can wake up pretty every single morning.*
12.	*Diss to CU display of product. Super: The Once-A-Month eye make-up.*	12.	*This complete DARK EYES kit will keep your eyes beautiful month after month...and it costs only $2.00.*
13.	*ECU of beautifully made-up eyes. One clear tear forms and trickles down cheek.*	13.	*So get carefree DARK EYES today--the once-a-month eye make-up that won't run, smear, wash off, cream off or even cry off.*

PAR. 7. Among the statements and representations made on the product package are the following:

Package Front: "Darkens lashes and brows with a tender tint* * *."

Package Back: "Stars and models recommend 'Dark-Eyes' tender tint* * *."

PAR. 8. Respondents market and advertise "Dark-Eyes" without disclosing in advertising or on the product package that application of the product can cause severe pain and irritation to the eye for a substantial period of time. This fact is a material fact, which if known to certain consumers would be likely to affect their decisions whether or not to purchase such product.

PAR. 9. Therefore, due to the failure to disclose the aforesaid material fact, all advertisements for "Dark-Eyes" which fail to disclose said fact (including those set forth in Paragraph Six) and all product packages which fail to disclose said fact constitute false advertisements and/or unfair or deceptive acts or practices in commerce.

PAR. 10. Through the use of the statements and representations set forth in Paragraph Seven, respondents have represented that "Dark-Eyes" is a "tender tint."

PAR. 11. In truth and in fact, "Dark-Eyes" is not tender. It can cause severe pain and irritation to the eye for a substantial period of time, requiring medical attention in some cases.

PAR. 12. Therefore, the statements and representations set forth in Paragraph Seven are misleading in a material respect, and constitute false advertisements and/or unfair or deceptive acts or practices in commerce.

PAR. 13. In the course and conduct of their aforesaid business, respondents have disseminated, and have authorized others to disseminate, through the United States mails and in commerce, the following statement or statements similar thereto in response to inquiries about the safety of "Dark-Eyes":

> One of the basic ingredients in "Dark-Eyes" is Silver Nitrate. It is common knowledge that the law in our 50 states require hospitals to use between 1 percent and 2 percent Silver Nitrate in every newborn baby's eyes to prevent infection and blindness. We use 1 percent Silver Nitrate in "Dark-Eyes." However, we do not use "Dark-Eyes" in the eyes—only used for on the eyelashes and eyebrows.

PAR. 14. Through use of the statement set forth in Paragraph Thirteen or other statements similar thereto, respondents have represented, directly or by implication:

a. That no formulation for "Dark-Eyes" then marketed contained in excess of 1 percent silver nitrate.

b. That no formulation for "Dark-Eyes" then marketed contained other ingredients which substantially contribute to the capacity of "Dark-Eyes" to cause severe pain and irritation.

c. That each formulation for "Dark-Eyes" then marketed does not cause severe pain and irritation because it contains no more than 1 percent silver nitrate.

PAR. 15. In truth and in fact, at the times the aforementioned statements were disseminated:

a. Each formulation of "Dark-Eyes" then marketed contained a concentration of silver nitrate in excess of 1 percent.

b. Each formulation for "Dark-Eyes" then marketed also contained substantial amounts of silver sulfate which acts similarly to silver nitrate in the "Dark-Eyes" formulae and which substantially contributes to the capacity of "Dark-Eyes" to cause severe pain and irritation.

c. Each formulation for "Dark-Eyes" can cause severe pain and irritation to the eye for a substantial period of time because it contains silver nitrate and silver sulfate, which produce an amount of silver ions in excess of the equivalent of a solution containing 2 percent silver nitrate.

PAR. 16. Therefore, the statements and representations set forth in Paragraph Thirteen were and are misleading in a material respect and constitute unfair or deceptive acts or practices in commerce.

PAR. 17. Through use of the advertisements set forth in Paragraph Six, and other advertisements not specifically set forth herein, respondents have represented directly or by implication that the application process depicted and described in the aforementioned advertisements is the complete process for the application of "Dark-Eyes."

PAR. 18. In truth and in fact the application process depicted and described in the advertisements set forth in Paragraph Six and in other advertisements not specifically set forth herein is not the complete process for application of "Dark-Eyes." The instructions for application contained inside the product package include additional procedures including covering all working surfaces with newspapers to protect against spills and stains, and application of Vaseline Petroleum Jelly to all areas of the skin around the eyes other than the eyelashes and eyebrows to prevent the unwanted staining of those areas. Said additional procedures are precautions required for prevention of unwanted results.

PAR. 19. Therefore, the statements and representations set forth in Paragraph Seventeen are false and misleading in a material respect and constitute false advertisements and unfair or deceptive acts or practices in commerce.

PAR. 20. By use of the advertisements set forth in Paragraph Six, and other advertisements not specifically set forth, respondents have presented demonstrations of the process of application of "Dark-Eyes."

For the reasons set forth in Paragraph Eighteen, said demonstrations substantially vary from and disregard the precautions set forth in the instructions for application of "Dark-Eyes" which are contained within the product package.

PAR. 21. Therefore, the advertisements set forth in Paragraph Six, and other advertisements not specifically set forth herein, negate the importance of closely following said instructions for application of "Dark-Eyes" and detract from the effectiveness of said precautions and constitute false advertisements and unfair or deceptive acts or practices in commerce.

PAR. 22. Respondents enclose instructions for application of "Dark-Eyes" within the product package. Said instructions state: "If fingers should become stained, moisten cotton with household bleach to remove." The said instructions do not warn against the use of household bleach to remove stains on the skin in the area around the eyes.

PAR. 23. The aforementioned instructions have the tendency or capacity to lead consumers to believe that unwanted stains should be removed from the area around the eyes by the use of household bleach.

PAR. 24. In truth and in fact, household bleach should not be used to remove stains from the area around the eyes. If consumers cleanse the area around their eyes with household bleach, there is a risk that household bleach may come in contact with the surface of the eye or surrounding eye tissue. Household bleach can cause severe and extensive pain and irritation to the eye if it comes into contact with the eye.

PAR. 25. Therefore, the failure of the aforementioned instructions to warn consumers that household bleach should not be used in the area around the eye constitutes an unfair or deceptive act or practice in commerce.

PAR. 26. In the course and conduct of its aforesaid business, and at all times mentioned herein respondents have been, and now are, in substantial competition in commerce, with other corporations engaged in the manufacture and sale of cosmetic products.

PAR. 27. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, in violation of Sections 12 and/or 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent C.E.B. Products, Inc. is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7115 Ridge Blvd., Chicago, Ill.

Respondent Charlotte E. Barth is an officer of C.E.B. Products, Inc. She formulates, directs, and controls the acts and practices of the corporate respondent C.E.B. Products, Inc., including the acts and practices hereinafter set forth. Her address is the same as that of C.E.B. Products, Inc.

Respondent Herman Goldenberg is an officer of C.E.B. Products, Inc. He participates in the formulation, direction, and control of the acts and practices of the corporate respondent C.E.B. Products, Inc., including the acts and practices hereinafter set forth. His address is the same as that of C.E.B. Products, Inc.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents C.E.B. Products, Inc., a corporation, its successors and assigns, and Charlotte E. Barth and Herman Goldenberg, individually and as officers of said corporation, and said respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, sale, offering for sale, or distribution of Dark-Eyes Lash and Brow Tint, or any other cosmetic product for use on the eyebrows, eyelashes, or otherwise in the area around the eyes, containing the same or substantially the same ingredients, including, but not limited to, silver nitrate, silver sulfate, or any other ingredients which produce silver ions when dissolved, forthwith cease and desist from directly or indirectly:

A. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement, or any statement made on the package in which such product is contained and sold (hereinafter referred to as the "product package"), which represents, directly or by implication, that such product is harmless, safe for use, noninjurious, nonirritating, tender, or gentle.

B. Disseminating, or causing to be disseminated, by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement or any product package which fails to contain, clearly and conspicuously, the following specific disclosure:

WARNING: "Dark-Eyes" [or such other name for such product] can cause severe pain to the eye for a substantial period of time.

Provided however, That Paragraph I(B) herein shall not apply to any such product for which a petition for listing as a "color additive" under Section 706 of the Food, Drug and Cosmetic Act, as amended, and regulations thereto, has been approved by the Secretary of the Department of Health, Education and Welfare where:

(1) respondents promptly notify the Commission that such a petition for listing has been filed with the Secretary of the Department of Health, Education and Welfare and make available to the Commission a copy of such petition and supporting documents;

(2) respondents promptly notify the Commission when the Secretary

has (pursuant to Section 701(e)(1) of the Food, Drug and Cosmetic Act, as amended) published his order acting on such petition; and

(3) respondents promptly notify the Commission of the effective date of such order;

Provided, further, however, That notwithstanding the foregoing proviso, the Commission may determine, upon its own initiative, that the above required disclosure, or some other disclosure of material fact(s) is required in the public interest.

C. Disseminating or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any statement or representation, including, but not limited to, statements or representations in advertising or contained on or within the product package which directly or by implication recommends or suggests for removing stains caused by such product from any part of the human body:

1. The use of chlorine bleach, or any substance of like composition, unless accompanied by a clear and conspicuous statement that said substance is hazardous to the eye and must not be used to remove stains from the face, eyelashes, or eyebrows.

2. The use of any substance which can cause pain or injury to any part of the human body; *Provided, however,* If such substance does not cause pain or injury when used on certain parts of the human body, then its use may be recommended or suggested on those particular parts if such recommendation or suggestion is accompanied by a clear and conspicuous statement that such substance is hazardous and must not be used on any other part of the body.

D. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any statement or representation, including but not limited to statements or representations in advertising or contained on or within the product package, which, directly or by implication, contradicts, negates, or is inconsistent with the disclosures required by Paragraph I(B) or I(C) above, or in any way obscures the meaning of such disclosure.

E. Disseminating, or causing to be disseminated, by any means, any advertisement or any product package, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of such product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which fails to contain the specific disclosure required by Paragraph I(B), above, or, when appropriate, the disclosures required by Paragraph I(C), above, or which contains any representation prohibited by Paragraphs I(A), I(C), or I(D), above.

II

It is ordered, That respondents C.E.B. Products, Inc., a corporation, its successors and assigns, and Charlotte Barth and Herman Goldenberg, individually and as officers of said corporation, and said respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, sale, offering for sale, or distribution of any cosmetic, drug, or device, as those terms are defined by the Federal Trade Commission Act, forthwith cease and desist from directly or indirectly:

A. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement or any statement made on the product package which affirmatively represents, directly or by implication, that the use of such product is safe, noninjurious, harmless, tender, or gentle, or that such product will not cause pain or irritation or other side effects, unless prior to the time such statement or representation is made, it has been demonstrated that such is the case by competent and reliable scientific tests; *Provided, however*, That it shall not be a violation of this provision to make such claims when qualified by setting forth, in immediate conjunction and equal conspicuousness, all of the circumstances under which, or the type of persons to whom, such claims are inapplicable, if such is the case.

B. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act,

(1) any advertisement or any statement or representation contained on or within the product package for such product which directly or by implication misrepresents the presence or quantity of any ingredient in such product;

(2) any statement or representation other than statements or representations made in advertising or contained on or within the product package for such product which purports to give the qualitative or quantitative formula for such product, or any portion thereof, or to describe the composition of such product, and which does not actually give the complete qualitative or quantitative formula.

C. Disseminating, or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement or any product package which relates or depicts any portion of the application process or method of use of such product without relating or depicting, in conjunction therewith and equally conspicuously, each "Type A" precaution which is set forth in the directions for use of such product (as those terms are defined in Part IV of this order); *Provided, however*, That it shall not be a violation of this provision to present no more than a single still depiction of an action in the application process or method of use of such product, so long as (a) nothing in said still depiction in any way negates, is inconsistent with, or detracts from the effectiveness of any of the "Type A" or "Type B" precautions set forth in the directions for use of such product, and (b) there is no representation, directly or by implication, that the entire application process or method of use of such product has been depicted.

D. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any statement or representation, including but not limited to statements or representations in advertising or contained on or within the product package, which directly or by implication contradicts, negates, or is inconsistent with the disclosures required by Paragraph II(A), II(B)(2) or II(C), above, or in any way obscures the meaning of such disclosure.

E. Disseminating, or causing to be disseminated, by any means, any advertisement or any product package, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of such product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which fails to contain, when appropriate, the disclosures required by Paragraph II(A), II(B)(2) or II(C), above, or which contains any representation prohibited by Paragraph II(A), II(B)(1), II(C) or II(D), above.

III

It is further ordered, That Paragraphs I(A), II(A), and II(B) of this order also apply to all oral or written statements or representations, whether or not such statements or representations are made in advertising, on or in a product package, or elsewhere, when made or authorized by the aforesaid respondents, to any of the following individuals, partnerships or corporations, whether or not doing business with respondents:

a. advertising agencies;

b. radio and television stations and print media;

c. representatives of Better Business Bureaus, the National Association of Broadcasters, the National Advertising Review Board, or other similar nongovernmental regulatory bodies;

d. purchasers, distributors, wholesalers, and retailers, except in connection with routine indemnifications or warranties specifically requested by the aforesaid;

e. members of the public, including correspondence with ultimate purchasers after purchase of such product.

IV

For the purposes of Parts II and IV of this order, the following definitions apply:

1. "Directions for use" means the directions or instructions for the application, use, or storage of a product or its packaging which are contained in the "labeling" (as defined in Section 201(m) of the Food, Drug and Cosmetic Act, as amended) of such product.

2. "Type A precaution" means an affirmative action relating to application or use (but not storage) of a product, prescribed by the directions for use of the product (whether stated affirmatively or negatively) for the purpose of avoiding or reducing a risk to person or property, and applicable to all or substantially all users of the product. By way of illustration and not limitation, the following are examples of "Type A" precautions: "Apply petroleum jelly to skin before use." "Do not use until petroleum jelly is applied to skin." "Shake well before using" [if this is prescribed for the purpose of avoiding or reducing a risk to person or property].

3. "Type B precaution" means all actions, except "Type A" precautions, proscribed or prescribed by the directions for use of a product for the purpose of avoiding or reducing a risk to person or property, including but not limited to the following categories of actions: (By way of illustration and not limitation, examples of "Type B" precautions are given after each category.)

(a) Actions relating to storage of a product. ("Refrigerate after opening." "Store in a cool dry place." "Keep out of reach of children.")

(b) Actions prescribed or proscribed for fewer than all or substantially all users of a product. ("If you have sensitive skin, wear gloves." "Do not use if you have kidney disease.")

(c) Actions to remedy problems which may arise in less than every instance of application or use. ("If product gets into eye, rinse out with water." "If a rash develops, see a doctor." "If product drips onto painted surface, wash off immediately.")

(d) Actions proscribed, whether stated affirmatively or negatively, in the directions for use. ("Do not use near open flame." "Use only in well ventilated areas." "For external use only." "Do not puncture or incinerate container.")

It is ordered, That respondents C.E.B. Products, Inc., a corporation, its successors and assigns, and Charlotte E. Barth and Herman

Goldenberg, individually and as officers of said corporation, and said respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, sale, offering for sale or distribution of any product, forthwith cease and desist from directly or indirectly:

A. Disseminating, or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement or any product package which relates or depicts the application process or method of use of such product which, in any way negates, is inconsistent with or detracts from the effectiveness of any of the "Type A" or "Type B" precautions set forth in the directions for use of such product.

B. Disseminating, or causing to be disseminated, by any means, any advertisement or any statement made on the product package, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of such product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any representation prohibited by Paragraph IV(A), above.

V

It is further ordered, That respondent C.E.B. Products, Inc., a corporation, its successors and assigns, and said respondent's officers, agents, representatives, and employees (but not Charlotte E. Barth or Herman Goldenberg in their individual capacities, nor A. Eicoff & Co., a corporation) directly or through any corporation, subsidiary, division, or other device, within 30 days from the entry of this order:

A. Correct (1) each and every previously disseminated point-of-purchase advertisement and cooperative print advertising copy for Dark-Eyes Lash and Brow Tint in the possession of any wholesaler, distributor or retail store (hereinafter referred to as "retailer") at the time of the entry of this order, and (2) each and every product package for said product which has been sold or otherwise distributed by respondent or its agents, distributors, wholesalers or chain headquarters, to wholesalers, distributors and retailers, which has not been sold to the ultimate consumer at the time of entry of this order, which contains the statements or representations prohibited in Paragraph I(A) of this order or which fails to contain the specific disclosure required in Paragraph I(B) of this order. The provisions of this Paragraph shall be fulfilled as follows:

i. With respect to cooperative print advertising copy, respondent shall (a) recall and retrieve such copy, or (b) instruct directly (or in the case of chain retailers, through chain headquarters) each and every such wholesaler, distributor or retailer to destroy such copy, and obtain from each such wholesaler, distributor and retailer a signed statement acknowledging the fact of said destruction.

ii. With respect to point-of-purchase advertising and product packages, respondent shall:

(a) Recall and retrieve said packages and advertising; or

(b) Distribute directly (or in the case of chain retailers, through chain headquarters) to each and every such wholesaler, distributor and retailer corrected product packages and advertising, instruct them that the packages and advertising which fail to comply with Paragraphs I(A) or (B) of this order are to be destroyed, and obtain from each such wholesaler, distributor and retailer, a signed statement acknowledging the fact of said destruction; or

(c) Distribute directly (or in the case of chain retailers, through chain headquarters) to each and every such wholesaler, distributor and retailer gummed strips to be placed on advertising and product packages, to obscure any representations prohibited by Paragraph I(A) of this order, and to include the disclosure required by Paragraph I(B) of this order, and obtain from each such wholesaler, distributor and retailer a signed statement acknowledging the fact of the placement of said gummed strips; or

(d) Distribute directly (or in the case of chain retailers, through chain headquarters) to each and every retailer to which respondent or its agents, distributors, wholesalers, or chain headquarters, sold or otherwise distributed Dark-Eyes Lash and Brow Tint, the point-of-purchase display attached hereto as Appendix A, (printed on any pastel colored paper), instruct each and every such retailer that such display is required to be prominently displayed adjacent to the packages of the product offered for sale by such retailer for such period of time as any package of Dark-Eyes Lash and Brow Tint which does not contain such disclosure required by Paragraph I(B) of this order is offered for sale or is on display in the store of such retailer, and obtain from each such retailer a signed statement acknowledging that such display has been placed as hereinbefore described;

Provided, however, That if respondent is unable to secure from any such wholesaler, distributor or retailer such a signed statement, it shall forthwith provide to the Commission an affidavit setting forth (a) the name of such wholesaler, distributor or retailer, (b) a description of respondent's attempts to secure such a signed statement and (c) the reasons for respondent's inability to secure such a signed statement; *Provided further, however,* That if respondent is unaware of the identity of any such retailer, it shall forthwith provide to the Commission an affidavit setting forth (a) a description of respondent's attempts to ascertain the identity of such retailer, and (b) the reasons for respondent's inability to ascertain the identity of such retailer.

B. Mail to each and every individual, partnership, corporation, or other entity to which said respondent or any of its officers, employees, or agents, including but not limited to A. Eicoff & Co., has, since Jan. 1, 1972, represented by letter that Dark-Eyes Lash and Brow Tint contains 1 percent silver nitrate, or has otherwise inaccurately or incompletely stated the formulation for Dark-Eyes Lash and Brow Tint, a letter correctly stating the complete formulation for each color of said product and include in said letter, a statement that the Federal Trade Commission had determined that Dark-Eyes Lash and Brow Tint can cause severe pain and irritation for a substantial period of time to the eyes of users of Dark-Eyes Lash and Brow Tint.

VI

It is further ordered, That notwithstanding the foregoing, Parts II, III, and IV, hereof shall not apply to the individual respondents Charlotte E. Barth and Herman Goldenberg, as an individual or as an agent of any corporation other than respondent C.E.B. Products, Inc., its successors or assigns, in her or his capacity as sales representative, jobber or in other similar capacities in which she or he sells, distributes, or disseminates packages or advertising, the claims or representations over which she or he has no control; *Provided, however*, That this exemption shall not apply to oral or written statements or representations originated by said individual respondents or those which she or he knew, at the time made to be false.

It is further ordered, That, notwithstanding the foregoing, Parts I, II, III, IV, and V, hereof, shall not apply to statements or representations, including but not limited to, statements or representations made in advertising or contained on or within the product package, which are or were disseminated or caused to be disseminated solely outside of the United States or its territories; *Provided, however*, That all "labeling" (as that term is defined in Section 201(m) of the Food, Drug and Cosmetic Act) shall comply with Section 801(d) of the Food, Drug and Cosmetic Act, as amended, and regulations thereto.

VII

It is further ordered, That the corporate respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the corporate respondent notify the Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That each respective individual respondent named herein promptly notify the Commission of the discontinuance of his or her present business or employment and/or his or her affiliation with a new business or employment in which he or she is involved in a management, policymaking or ownership capacity. Such notice shall include his or her current business address and a statement as to the nature of the business or employment in which he or she is engaged, as well as a description of his or her duties and responsibilities.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

APPENDIX A

WARNING: 'Dark - Eyes' can cause severe pain to the eye for a substantial period of time.

IN THE MATTER OF

A. EICOFF & CO.

CONSENT ORDER, IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2651. Complaint, Mar. 17, 1975 - Decision, Mar. 17, 1975

Consent order requiring a Chicago, Ill., advertising agency, among other things to cease disseminating advertising material or product packaging which fails to provide consumers with warning information regarding use of the product when necessary.

Appearances

For the Commission: *Stewart A. Block* and *Marvin R. Lange.*

For the respondent: *P. W. O'Brien* and *W. T. Braithwaite.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that A. Eicoff & Co., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

1. "Commerce" means commerce as defined in the Federal Trade Commission Act;
2. "False advertisement" means false advertisement as defined in the Federal Trade Commission Act;
3. "Dark-Eyes" means the product "Dark-Eyes Lash and Brow Tint" in each formulation in which it is packaged and sold to the public.
4. "Product package" means the package in which "Dark-Eyes Lash and Brow Tint" is contained and sold.

PAR. 2. Respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 520 N. Michigan Ave., Chicago, Ill.

PAR. 3. Respondent is now, and for all times relevant to this complaint has been, an advertising agency of C.E.B. Products, Inc., and now, and for all times relevant to this complaint, has prepared and placed for publication and has caused the dissemination of the television advertisements referred to herein, to promote the sale of a liquid eyelash and eyebrow darkener, sold and distributed by C.E.B. Products, Inc., and designated as "Dark-Eyes Lash and Brow Tint." Said product is a "cosmetic" as that term is defined in Section 15 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its aforesaid business, respondent has disseminated, or has caused to be disseminated, in commerce, advertisements for the purpose of inducing, or which are likely to induce, the purchase of "Dark-Eyes," and has disseminated or has caused to be disseminated advertisements for the purpose of inducing, or which are likely to induce, the purchase, in commerce, of "Dark-Eyes."

PAR. 5. Among the advertisements disseminated by means of television, but not all inclusive thereof, are the following:

A. EICOFF & COMPANY

advertising · marketing · 520 N. MICHIGAN AVE. · CHICAGO, ILLINOIS 60611
PHONE (312) 944 2300

1.	***Open on MLS of two women in bedroom. Daughter opens box with wedding dress and holds up for mother to see.***	*1.*	***When a woman cries... You never really know...***
2.	***Cut to CU of mother crying.***	*2.*	***She could be happy...or sad.***
3.	***Cut MS of girl, who also starts crying.***	*3.*	***But then, that's what makes her a woman...and that makes her all the more beautiful.***
4.	***Zoom to CU of girl's face to show how tears have made mascara run down her face.***	*4.*	***Except if those tears make her mascara run. She can't stop those tears.***
5.	***Cut to MLS as Mother hands tissue to girl who dabs away tears.***	*5.*	***but she should have used the unique eye make-up that won't run, smear, wash off, or even cry off for weeks and weeks.***
6.	***Diss. to CU of Dark Eyes Pkg. chromakeyed over a calendar. SUPER: The Once-A-Month Eye Make-Up.***	*6.*	***It's called DARK EYES. DARK EYES is not a mascara...It's a once-a-month eye cosmetic tint that could save you lots of tedious make-up time each week.***
7.	***Diss. to MCU of girl lightly dabbing vaseline on eyes and above brows.***	*7.*	***Here's what you do. First, apply a little vaseline around your eyes.***
8.	***Diss. to display of pkg. and bottles. Hand enters and dips brush into cap filled with liquid.***	*8.*	***Then simply brush your lashes gently with DARK EYES # 1.***
9.	***Cut to CU as girl applies Dark Eyes to lashes.***	*9.*	***and let dry for a few minutes.***
10.	***Diss. to CU of girl's eyes as she applies Dark Eyes # 2... then wipes with cotton ball.***	*10.*	***Now, brush them again with DARK EYES # 2 and wipe with a moist cotton ball. That's all there is to it.***
11.	***Diss. to girl applying Dark Eyes to brows.***	*11.*	***For eyebrows, apply DARK EYES the same way.***
12.	***Diss. to same girl in shower. Zoom into CU of eyes.***	*12.*	***Now, go ahead and shower...even go swimming as often as you like...DARK EYES won't wash off.***
13.	***Diss. to CU of same girl using cream on face.***	*13.*	***And, don't hesitate to cream your face...DARK EYES won't cream off.***
14.	***Diss. to same girl in bed, just awakening.***	*14.*	***But best yet, when you use DARK EYES you'll wake up pretty every single morning.***
15.	***Diss. to CU display of product. SUPER: The Once-A-Month Eye Make-Up. also SUPER: $2.00***	*15.*	***This complete DARK EYES kit will keep your eyes beautiful month after month...and it costs only $2.00.***
16.	***Diss. to wedding scene in church. CU of bride and groom. Groom lifts veil, camera zooms to CU of girls face to show tears on cheek.***	*16.*	***So get DARK EYES today--the once-a-month eye make-up that won't run, smear, wash off, cream off or even cry off.***

A. EICOFF & COMPANY

advertising · marketing · **520 N. MICHIGAN AVE. · CHICAGO, ILLINOIS 60611**
PHONE (312) 944 2300

1.	*MS of man and woman in romantic dinner table setting with candlelight. Man hands woman engagement ring.*	*1.*	*It's the moment you've waited for... and you wanted to look your loveliest. A romantic candlelight dinner...and now, you're engaged.*
2.	*Cut to CU of girl's face. She's weeping tears of joy and mascara is streaking.*	*2.*	*But just look at you...with your mascara running down your face.*
3.	*Cut back to MS as man hands woman his handkerchief and she dabs at her eyes.*	*3.*	*You can't stop those happy tears, but you should have used the amazing eye make-up that won't run, smear, wash off, or even cry off for weeks and weeks.*
4.	*Diss to CU of Dark Eyes pkg chroma-keyed over calendar page. Super: The Once-a-month eye make-up.*	*4.*	*It's called DARK EYES. DARK EYES is not a mascare..it's a Once-A-Month eye make-up that will save you hours of tense make-up time each week.*
5.	*Diss to display of pkg and bottles. Hand enters scene and dips brush into cap filled with liquid.*	*5.*	*Just a few minutes ONCE A MONTH with DARK EYES and your eyes will stay beautiful, no matter what you do.*
6.	*Cut to CU of girl's eyes as she applies Dark Eyes to her eyelashes.*	*6.*	*Here's how it works. Simply brush your lashes gently with DARK EYES # 1 and let dry for a few minutes.*
7.	*Diss to CU of girl's eyes as she applies Dark Eyes # 2...then wipes with cotton ball.*	*7.*	*Then brush them again with DARK EYES # 2 and wipe with a moist cotton ball. It's that easy.*
8.	*Girl applies Dark Eyes to her eyebrows.*	*8.*	*For eyebrows, apply DARK EYES the same way.*
9.	*Diss to same girl in shower. Zoom to CU of eyes.*	*9.*	*Now, go ahead and shower...even go swimming...as often as you like... DARK EYES won't wash off.*
10.	*Diss to CU of same girl using cream on face.*	*10.*	*And don't hesitate to cream your face...DARK EYES won't even cream off.*
11.	*Diss to same girl in bed just awakening.*	*11.*	*But best yet, with DARK EYES you can wake up pretty every single morning.*
12.	*Diss to CU display of product. Super: The Once-A-Month eye make-up.*	*12.*	*This complete DARK EYES kit will keep your eyes beautiful month after month...and it costs only $2.00.*
13.	*ECU of beautifully made-up eyes. One clear tear forms and trickles down cheek.*	*13.*	*So get carefree DARK EYES today--the once-a-month eye make-up that won't run, smear, wash off, cream off or even cry off.*

PAR. 6. Through use of the advertisements set forth in Paragraph Five, and other advertisements not specifically set forth herein, respondent has represented directly or by implication that the application process depicted and described in the aforementioned advertisements is the complete process for the application of "Dark-Eyes."

PAR. 7. In truth and in fact the application process depicted and described in the advertisements set forth in Paragraph Five and in other advertisements not specifically set forth herein is not the complete process for application of "Dark-Eyes." The instructions for application contained inside the product package include additional procedures including covering all working surfaces with newspapers to protect against spills and stains, and application of Vaseline Petroleum Jelly to all areas of the skin around the eyes other than the eyelashes and eyebrows to prevent the unwanted staining of those areas. Said additional procedures are precautions required for prevention of unwanted results.

PAR. 8. Therefore, the statements and representations set forth in Paragraph Six are false and misleading in a material respect and constitute false advertisements and unfair or deceptive acts or practices in commerce.

PAR. 9. By use of the advertisements set forth in Paragraph Five, and other advertisements not specifically set forth herein, respondent has presented demonstrations of the process of application of "Dark-Eyes." For the reasons set forth in Paragraph Seven, said demonstrations substantially vary from and disregard the precautions set forth in the instructions for application of "Dark-Eyes" which are contained within the product package.

PAR. 10. Therefore, the advertisements set forth in Paragraph Five, and other advertisements not specifically set forth herein, negate the importance of closely following said instructions for application of "Dark-Eyes" and detract from the effectiveness of said precautions and constitute false advertisements and unfair or deceptive acts or practices in commerce.

PAR. 11. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been and now is, in substantial competition in commerce with other advertising agencies.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, including the dissemination of false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, in violation of Section 12 and/or 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent had violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent A. Eicoff & Co., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 520 N. Michigan Ave., Chicago, Ill.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purposes of the order the following definitions apply:

1. "Directions for use" means the directions or instructions for the application, use, or storage of a product or its packaging which are

contained in the "labeling" (as defined in Section 201(m) of the Food, Drug and Cosmetic Act, as amended) of such product.

2. "Type A precaution" means an affirmative action relating to application or use (but not storage) of a product, prescribed by the directions for use of the product (whether stated affirmatively or negatively) for the purpose of avoiding or reducing a risk to person or property, and applicable to all or substantially all users of the product. By way of illustration and not limitation, the following are examples of "Type A" precautions: "Apply petroleum jelly to skin before use." "Do not use until petroleum jelly is applied to skin." "Shake well before using" [if this is prescribed for the purpose of avoiding or reducing a risk to person or property].

3. "Type B precaution" means all actions, except "Type A" precautions, proscribed or prescribed by the directions for use of a product for the purpose of avoiding or reducing a risk to person or property, including but not limited to the following categories of actions: (By way of illustration and not limitation, examples of "Type B" precautions are given after each category.)

(a) Actions relation to storage of a product. ("Refrigerate after opening." "Store in a cool dry place." "Keep out of reach of children.")

(b) Actions prescribed or proscribed for fewer than all or substantially all users of a product. ("If you have sensitive skin, wear gloves." "Do not use if you have kidney disease.")

(c) Actions to remedy problems which may arise in less than every instance of application or use. ("If product gets into eye, rinse out with water." "If a rash develops, see a doctor." "If product drips onto painted surface, wash off immediately.")

(d) Actions proscribed, whether stated affirmatively or negatively, in the directions for use. ("Do not use near open flame." "Use only in well ventilated areas." "For external use only." "Do not puncture or incinerate container.")

I

It is ordered, That respondent A. Eicoff & Co., a corporation, its successors and assigns and said respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, sale, offering for sale or distribution of any drug, cosmetic or device, as those terms are defined by the Federal Trade Commission Act, forthwith cease and desist from directly or indirectly:

A. Disseminating, or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement, or any product package, which relates or depicts any portion of the application process or method of use of such product without relating or depicting, in conjunction therewith and equally conspicuously, each "Type A" precaution which is set forth in the directions for use of such product; *Provided, however,* That it shall not be a violation of this provision to present no more than a single still depiction of any action in the application process or method of use of such product, so long as (a) nothing in said still depiction in any way negates, is inconsistent with, or detracts from the effectiveness of any of the "Type A" or "Type B" precautions set forth in the directions for use of such product, and (b) there is no representation, directly or by implication, that the entire application process or method of use of such product has been depicted.

B. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any statement or representation, including but not limited to statements or representations in advertising or contained on or within the product package, or visual depiction, which, directly or by implication, contradicts, negates, or is inconsistent with the disclosure required by Paragraph I(A), above, or in any way obscures the meaning of such disclosure.

C. Disseminating, or causing to be disseminated, by any means, any advertisement or any statement made on the product package, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of such product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which fails to contain the disclosures required by Paragraph I(A), above, or which contains any representation prohibited by Paragraphs I(A) or I(B) above.

II

It is ordered, That respondent A. Eicoff & Co., a corporation, its successors and assigns and said respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, sale, offering for sale or distribution of any product, forthwith cease and desist from directly or indirectly:

A. Disseminating, or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement, or any product package, which relates or depicts the application process or method of use of such product which in any way negates, is inconsistent with or detracts from the effectiveness of any of the "Type A" or "Type B" precautions set forth in the directions for use of such product.

B. Disseminating, or causing to be disseminated, by any means, any advertisement or any statement made on the product package, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of such product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any representation prohibited by Paragraph II(A), above.

III

It is further ordered, That the respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondent notify the Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

ANDREW A. SILANI, T/A ANDY SILANI, REALTOR

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2652. Complaint, Mar. 17, 1975 - Decision, Mar. 17, 1975

Consent order requiring a Klamath Falls, Oreg., real estate broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Thornton Percival.*

For the respondent: *Theodore B. Jensen, Davis, Jensen, DeFranco & Holmes*, Portland, Oreg.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Andrew A. Silani, an individual trading and doing business as Andy Silani, Realtor, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Andrew A. Silani is an individual trading and doing business as Andy Silani, Realtor, with his principal office and place of business located at 314 S. Seventh St., Klamath Falls, Oreg.

PAR. 2. Respondent is now and for some time last past has been engaged in the business of a real estate broker. In such capacity, he offers for sale and arranges sales of real property to the general public, and provides various other services to persons who engage him directly or indirectly to sell such property. Fees for respondent's services are payable by such persons, hereinafter referred to as "clients."

PAR. 3. In the ordinary course of business as aforesaid, respondent regularly extends consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondent, in the ordinary course of business as aforesaid, has extended and is extending consumer credit to purchasers of real property by causing such purchasers to execute promissory notes, hereinafter referred to as the "purchaser note," in the amount of the purchaser's downpayment or a portion thereof. Respondent does not provide these purchasers with any consumer credit cost disclosures other than those in the promissory note.

PAR. 5. Subsequent to July 1, 1969, respondent, in the ordinary course of business as aforesaid, has extended and is extending consumer credit to clients by causing them to execute promissory notes, hereinafter referred to as the "client note," in the amount of respondent's fee or a portion thereof. These extensions of credit to clients are credit sales, as "credit sale" is defined in Regulation Z. Respondent does not provide such clients with any consumer credit cost disclosures other than those in the client note.

PAR. 6. By and through the use of the purchaser note and the client note, respondent:

1. Fails to use the term "annual percentage rate" to describe the annual percentage rate of the finance charge, computed in accordance

with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Fails in some instances to disclose the number, amounts and due dates or periods of payments scheduled to repay the indebtedness, and the sum of such payments, and to describe that sum as the "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

3. Fails to use the term "amount financed" to describe the amount of credit extended, as required by Sections 226.8(c)(7) and 226.8(d)(1) of Regulation Z.

4. Fails to disclose the sum of all charges required by Section 226.4 of Regulation Z to be included therein, and to describe that sum as the "finance charge," as required by Sections 226.8(c)(8)(i) and 226.8(d)(3) of Regulation Z.

5. Fails in credit sales to use the term "cash price," as defined in Section 226.2(i) of Regulation Z, to describe respondent's fee or price for the services purchased, as required by Section 226.8(c)(1) of Regulation Z.

6. Fails in credit sales to disclose the downpayment, as required by Section 226.8(c)(2) of Regulation Z.

7. Fails in credit sales to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

8. Fails to furnish to the customer a duplicate of the instrument or other statement containing the disclosures prescribed by Section 226.8 of Regulation Z, as required by Section 226.8(a) of Regulation Z.

PAR. 7. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Andrew A. Silani is an individual trading and doing business as Andy Silani, Realtor, with his principal office and place of business located at 314 S. Seventh St., Klamath Falls, Oreg.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Andrew A. Silani, an individual trading and doing business as Andy Silani, Realtor, or under any other name or names, and respondent's successors, assigns, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. § 1601, *et. seq.*), do forthwith cease and desist from:

1. Failing to use the term "annual percentage rate" to describe the annual percentage rate of the finance charge, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Failing to disclose the number, amounts and due dates or periods of payments scheduled to repay the indebtedness, and the sum of such payments, and to describe that sum as the "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

3. Failing to use the term "amount financed" to describe the amount

of credit extended, as required by Sections 226.8(c)(7) and 226.8(d)(1) of Regulation Z, as applicable.

4. Failing to disclose the sum of all charges required by Section 226.4 of Regulation Z to be included therein, and to describe that sum as the "finance charge," as required by Sections 226.8(c)(8)(i) and 226.8(d)(3) of Regulation Z, as applicable.

5. Failing in credit sales to use the term "cash price," as defined in Section 226.2(i) of Regulation Z, to describe respondent's fee or price for the services purchased, as required by Section 226.8(c)(1) of Regulation Z.

6. Failing in credit sales to disclose the downpayment, as required by Section 226.8(c)(2) of Regulation Z.

7. Failing in credit sales to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

8. Failing to furnish to the customer, before the transaction is consummated, a duplicate of the instrument or other statement containing the disclosures required by Section 226.8 of Regulation Z, as required by Section 226.8(a) of Regulation Z.

9. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, at the time and in the manner, form and amounts required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future agents and/or employees of respondent engaged in the consummation of any extension of consumer credit or in any aspect of the preparation, creation or placing of advertising, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondent prominently display the following notice in two or more locations in that portion of respondent's business premises most frequented by prospective customers, and in each location where customers normally sign consumer credit documents or other binding instruments. Such notices shall be considered prominently displayed only if so positioned and of such size as to be easily observed and read by the intended individuals:

NOTICE TO SELLERS AND PURCHASERS

IF THE REALTOR IS FINANCING ANY FEE YOU MAY OWE HIM FOR HIS SERVICES, OR ANY OTHER AMOUNT CONNECTED WITH THE SALE

TRANSACTION, YOU ARE ENTITLED TO CONSUMER CREDIT COST DISCLOSURES AS REQUIRED BY THE FEDERAL TRUTH IN LENDING ACT. THESE MUST BE PROVIDED TO YOU IN WRITING BEFORE YOU ARE ASKED TO SIGN A PROMISSORY NOTE OR ANY OTHER DOCUMENT OR PAPERS WHICH WOULD BIND YOU TO SUCH FINANCING.

It is further ordered, That respondent promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

HALLBERG HOMES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2653. Complaint, Mar. 17, 1975 - Decision, Mar. 17, 1975

Consent order requiring a Portland, Oreg., residential real property construction and development firm, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Dean A. Fournier* and *Michael A. Katz*.

For the respondents: *Milton G. Lankton, Black, Kendell, Tremaine, Boothe* [*Higgins*, Portland, Oreg.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hallberg Homes, Inc., a corporation, and Ray C. Hallberg, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hallberg Homes is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal office and place of business located at 1718 Northeast 82nd Ave., Portland, Oreg.

Respondent Ray C. Hallberg is an individual and an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the construction, development and sale of residential real property to the public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents have caused to be published various advertisements, as "advertisement" is defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. These advertisements have aided, promoted or assisted directly or indirectly the extension of consumer credit (as "consumer credit" is defined in Regulation Z) in connection with respondents' sales of residential real property.

PAR. 4. Subsequent to July 1, 1969, certain of the advertisements referred to in Paragraph Three above have stated the amount of the downpayment required or that no downpayment is required, without also stating, as required by Section 226.10(d)(2) of Regulation Z, in terminology prescribed under Section 226.8 of Regulation Z, and in the manner and form prescribed under Section 226.6(a) of Regulation Z, all of the following:

A. the cash price;

B. the amount of the downpayment required or that no downpayment is required, as applicable;

C. the number, amount, and due dates or period of payments scheduled to repay the indebtedness;

D. the amount of the finance charge expressed as an annual percentage rate; and

E. except in the case of the sale of a dwelling or a loan secured by a first lien on a dwelling to purchase that dwelling, the deferred payment price or the sum of the payments, as applicable.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of

Regulation Z constitute violations of that Act, and pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

A. Respondent Hallberg Homes, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal office and place of business located at 1718 Northeast 82nd Ave., Portland, Oreg.

Respondent Ray C. Hallberg is an individual and an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Hallberg Homes, Inc., a corporation, its successors and assigns, and its officers, and Ray C. Hallberg, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any extension or arrangement for the extension of consumer credit, or any advertisement to aid, promote or assist, directly or indirectly any extension of consumer credit, as "advertisement" and "consumer credit" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

A. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any installment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

1. the cash price;
2. the amount of the downpayment required or that no downpayment is required, as applicable;
3. the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
4. the amount of the finance charge expressed as an annual percentage rate; and
5. except in the case of the sale of a dwelling or a loan secured by a first lien on a dwelling to purchase that dwelling, the deferred payment price or the sum of the payments, as applicable.

B. Failing, in any consumer credit advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, at the time and in the manner, form and amount required by Sections 226.6, 226.7, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in any aspect of the preparation, creation or placing of advertising, to all persons engaged in reviewing the legal sufficiency of advertising, and to all present and future agencies engaged in preparation, creation or placing of advertising on behalf of respondents, and that respondents secure from each such person and agency a signed statement acknowledging receipt of said order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment, and/or of his affiliation with any other business which extends, arranges or advertises consumer credit, in the event of such discontinuance or affiliation within ten (10) years after the effective date of this order. Such notice shall include the respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

CROWN CENTRAL PETROLEUM CORPORATION

Docket 8851. Order, March 25, 1975.

Denial of respondent's petition for reconsideration and modification of final order.

Appearances

For the Commission: *Fauster J. Vittone* and *Jean F. Greene.*

For the respondents: *James H. Kelley, Bergson, Borkland, Margolis & Adler*, Wash., D.C.

ORDER DENYING PETITION FOR RECONSIDERATION AND MODIFICATION OF FINAL ORDER.

Respondent has moved that the Commission modify its final order in this matter by striking the phrase "or any other product" from the preamble of the order and by deleting or modifying Paragraph 1(d) of the order which requires respondent to cease and desist from representing that any gasoline or gasoline additive product has "any other quality, performance ability or other characteristic" unless the representation is true and has been substantiated by competent scientific tests. Counsel supporting the complaint have filed an answer opposing the requested modifications.

Respondent's request that the order be modified is denied. Despite the "or any other product" recitation in the preamble, the remaining text of the order requires substantiation for only two classes of claims: (1) those that deal with ability of a Crown product to reduce motor vehicle exhaust, and (2) claims regarding a "quality, performance ability or other characteristic" of a gasoline or gasoline additive product. Requiring supporting scientific tests for these two categories of claims is reasonably related to the violation found. Respondent's avowed concern that it will have to conduct scientific tests before mentioning even the "price" or "availability" of its gasoline in advertisements is misplaced. References to price and availability of its products are not quality or performance "characteristics" under the order.

It is ordered, That the aforesaid petition be, and it hereby is, denied.

IN THE MATTER OF

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.

ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF FEDERAL TRADE COMMISSION ACT

Docket 8916. Complaint, Feb. 16, 1973 - Final Order, Mar. 25, 1975

Order requiring one of the nation's two largest supermarket chains, headquartered in Montvale, N.J., among other things to have advertised items readily available for sale at or below advertised prices.

Appearances

For the Commission: *Michael C. McCarey, Joel P. Bennett* and *Rosalind A. Lazarus.*

For the respondent: *Donald J. Mulvihill, Cahill, Gordon & Reindel,* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that The Great Atlantic & Pacific Tea Company, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Great Atlantic & Pacific Tea

Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 420 Lexington Ave., N.Y., N.Y.

PAR. 2. Respondent is now, and for some time last past has been engaged in the operation of a large chain of retail food stores. Respondent presently operates 4,329 retail food stores in 36 States of the United States, the District of Columbia and Canada. Its volume of business has been and is substantial. In the operation of its retail food stores, respondent offers to its customers an extensive line of products, including food, as that term is defined in the Federal Trade Commission Act, groceries and other merchandise. Many of the said products offered for sale and sold are manufactured or processed by respondent through its various divisions, subsidiaries and affiliates at manufacturing and processing plants located in various States. Many of the said products, however, are purchased from numerous independent suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid food and grocery products and other merchandise to be shipped and distributed from the aforesaid manufacturing and processing plants or from its other sources of supply to warehouses and distribution centers and thereafter to its retail food stores located in various States other than the State of origination, distribution or storage of said products. Respondent maintains, and at all times mentioned herein has maintained a substantial course of trade in the production, processing, distribution, advertising, offering for sale and sale of the aforesaid food and grocery products and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid food and grocery products and other merchandise by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said products from respondent; and respondent has been and is now disseminating, and causing the dissemination of, advertisements concerning said products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase from respondent of the said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of the said advertisements list or depict the aforesaid food and grocery products and other merchandise, and also contain statements and representations concerning the price or terms at which said products would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the geographical areas in which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated and are now being disseminated in various areas of the United States served by respondent's retail food stores, respondent has represented and is now representing directly or by implication, that in its retail food stores in the aforesaid various areas of the United States in which said advertisements were and are being disseminated, in those stores covered by the said advertisements, during the effective periods of the advertised offers, the items listed or depicted in the said advertisements would be or are:

1. Readily available for sale, and
2. Conspicuously available for sale at or below the advertised prices.

PAR. 6. In truth and in fact, in a number of respondent's retail food stores located in the aforesaid various areas throughout the United States in which the aforesaid advertisements were and are being disseminated, in stores covered by the said advertisements, during the effective periods of the advertised offers, a substantial number of the items listed or depicted in the said advertisements were or are:

1. Not readily available for sale, or
2. Not conspicuously available for sale at or below the advertised prices.

Therefore, the statements and representations as referred to herein, were and are false, misleading and deceptive, and each of the said advertisements was and is misleading in material respects and constituted, and now constitutes a "false advertisement", as that term is defined in the Federal Trade Commission Act.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale, food or grocery products or other merchandise, as aforesaid, and by failing to have in each of its stores located within the areas covered by such advertisements, during the effective periods of the advertised offers, in quantities sufficient to meet reasonably anticipated demands, the advertised items:

1. Readily available for sale to customers; or

2. Conspicuously available for sale at or below the advertised prices;

respondent has been and now is engaged in unfair acts and practices.

PAR. 8. In the course and conduct of its business, and at all times referred to herein, respondent has been, and now is, in substantial competition in commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 9. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices including the dissemination of the aforesaid "false advertisements," has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and are true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items.

PAR. 10. The acts and practices as aforesaid, and the dissemination by respondent of the false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW JUDGE

JANUARY 24, 1975

I

Allegations of Complaint

In a complaint served on Mar. 1, 1973, the Commission charged The Great Atlantic & Pacific Tea Company, Inc. (A&P), with disseminating advertisements in various metropolitan areas in which its retail food stores were located offering food and grocery products, and other merchandise, at particular prices when, in a number of stores covered by such advertisements, a substantial number of advertised items were not available at or below the advertised prices. According to the complaint respondent A&P had engaged in false, misleading and deceptive advertising, and had utilized unfair acts and practices in violation of Sections 5 and 12 of the Federal Trade Commission Act.

More particularly, Paragraph Five of the complaint alleged that

A&P's advertisements for food, grocery and other products constituted representations that its retail food stores, in the areas covered by the advertisements, during the effective periods of such advertisements, would have the particular items listed or depicted in the advertisements:

1. readily available for sale, and
2. conspicuously available for sale at or below the advertised prices.

The complaint alleged under Paragraph Six that a substantial number of the items listed or depicted in the advertisements were "not readily available for sale," or were "not conspicuously available for sale at or below the advertised prices," in a number of the retail food stores located in the areas in which the advertisements were disseminated during the effective periods of the "advertised offers." The complaint charged that the advertisements were therefore "false, misleading and deceptive," were "misleading in material respects," and constituted false advertisements. The complaint further alleged that the challenged advertisements had the tendency and capacity to mislead members of the purchasing public, to induce them to go to respondent A&P's retail food stores, to purchase substantial quantities of the advertised items at prices in excess of those advertised, and to purchase substantial quantities of items other than those advertised, all to the prejudice and injury of the public and of A&P's competitors.

On Apr. 11, 1973, A&P filed an answer denying that any of its advertisements were unfair, misleading or deceptive. The answer denied that its advertisements for food and grocery products, and other merchandise, made the representations as to availability set forth in paragraph five of the complaint, and denied that any of its advertisements were misleading or deceptive in any material respect or constituted false advertisements.

The answer of A&P affirmatively declared that the complaint and proposed order were discriminatory as to A&P, and violative of its constitutional rights of due process. A&P asserted that the Commission had previously promulgated a Trade Regulation Rule for the Retail Food Industry "in less onerous terms than the standard announced" in the complaint and notice order issued against it. A&P asserted that the Commission, being frustrated in its efforts "to establish a standard for the entire food industry due to the successful challenge to its rulemaking authority," had sought to establish such a standard by selecting A&P, as one of the industry's largest and most visible members, for an adjudicatory proceeding. A&P asserted that the complaint and notice order were discriminatory because they sought to establish a far stricter standard for A&P than the standard previously established for the retail food industry in the Trade Regulation Rule, and that whereas the Commission previously sought to "regulate" the retail food industry, it now sought to "annihilate" A&P by such far stricter standard. The answer asserted that under the notice order, contrary to previously articulated policy, the Commission would refuse to consider as relevant for A&P (1) failure of delivery due to circumstances beyond the A&P's control, (2) failure to have advertised items "conspicuously and readily available" for sale "at or below the advertised prices" due to circumstances beyond A&P's control, and (3) the availability of "rain checks."

The answer of A&P contended that the complaint and notice order were premised on the theory that a food retailer's advertising was a virtual guarantee that all advertised items would be, for the entire duration of the advertisement, "in stock and readily available" for sale, with the advertised price "conspicuous" thereon, and that the complaint failed to allow for underestimation of demand or even for failure of delivery because of circumstances beyond the advertiser's control. According to the answer, the complaint did not take into account A&P's "rain check" policy, that every item out of 7,500 to 12,500 could not be individually marked and, further, that prices on some sale items were adjusted at the check-out counter. The answer contended that if the theory in the complaint and notice order were sustained, the result would be to impede the flow of truthful and important information because A&P, and others, would be forced to resort to meaningless, noninformative advertising.

Finally, A&P asserted that the proceeding was based on the assumption that A&P's advertisements represented that the advertised food items would be "readily" and "conspicuously" available for sale at the advertised prices, that complaint counsel had the burden of proving that the advertisements in fact made such express or implied representations, but that the complaint made it clear that the Commission had already "prejudged this issue against A&P." In conclusion, A&P asserted that the relief sought in the proposed order was arbitrary and capricious, and that the relief would violate A&P's constitutional right to communicate to the public "truthful and factual" information.

History of Proceeding

Pretrial proceedings including discovery were commenced as soon as the answer of respondent A&P was filed. The first pretrial conference was held on May 8, 1973, and a number of such conferences were held thereafter. Inasmuch as the heart of complaint counsel's evidentiary proof consisted of surveys of supermarket and retail food stores of A&P and other leading chains for the availability and pricing of advertised products, conducted in a number of metropolitan areas, the validity of the methodology and the correctness of execution of these surveys became a major focus of pretrial preparations. In July 1973 complaint counsel filed a detailed offer of proof of two surveys, together with tables, charts, statement of methodology, legal authority and underlying data, requesting a preliminary ruling that the surveys were admissible in evidence.

The first survey of complaint counsel was designed and conducted under the supervision of a member of the faculty of the School of Law of the University of North Carolina, and was done in the Raleigh, Durham and Chapel Hill areas in the spring of 1972 by law students and members of the North Carolina Consumer Council. The second survey had been conducted in 1971 by Commission personnel from its Regional Offices under the general supervision of the Commission's Bureau of Economics. Supermarkets and retail food stores were surveyed in cities in four geographic areas, the Northeast, Southeast, Midwest and Far West. Regional office employees monitored supermarket and retail food stores of A&P and its leading competitors in 12 medium sized and small cities in their assigned areas.

After complaint counsel submitted their offer of proof respondent A&P engaged consulting economists, the National Economic Research Associates, Inc., and an expert in social research from the faculty of American University, Wash., D.C., to analyze the surveys, the methodology and execution thereof, and all underlying material. On Nov. 16, 1973, a comprehensive analysis of the North Carolina survey and the survey conducted by the Commission's regional offices, and all underlying material, was filed by A&P, together with a legal memorandum vigorously opposing any preliminary ruling that the surveys were admissible in evidence. A number of serious problems with the surveys, both in design and execution, were identified.

While complaint counsel's offer of proof containing the North Carolina and 1971 Commission surveys were under analysis by A&P and its experts, it developed that a new Commission survey had been conducted in April and May of 1973, and that the results of this survey were being prepared for presentation in this proceeding.

On Dec. 20, 1973, the undersigned denied the motion of complaint counsel for a preliminary or tentative ruling that the North Carolina and the Commission surveys were admissible in evidence. The undersigned concluded that "enough questions had been raised" by A&P's experts, "which could or might be serious" as to render full evidentiary hearings on the reliability and admissibility of the surveys necessary before any ruling, even preliminary, could be made. At the same time counsel for both sides were requested to submit the earliest practicable date for commencement of hearings on the merits.

On Jan. 15, 1974, A&P moved the Commission for reexamination of the Trade Regulation Rule governing "Retail Food Store Advertising and Marketing Practices" issued July 12, 1971, and filed with the undersigned a motion for a stay of proceedings pending Commission action on such motion, requesting certification thereof to the Commission. The undersigned certified the motion for a stay, and on Jan. 31, 1974, the Commission denied it.

On Feb. 6, 1974, the National Association of Food Chains filed a motion with the Commission to intervene in this proceeding, and on Feb. 7, 1974, respondent A&P moved the Commission to reconsider its denial of the motion for a stay pending Commission action on the motion for reexamination of the trade regulation rule.

In the meantime, the undersigned set hearings on the merits to commence May 21, 1974, this being the earliest date complaint counsel considered practical for commencing the case-in-chief.

On Mar. 11, 1974, the Commission denied the motion of the National Association Of Food Chains to intervene noting that such motion should initially have been made to the Administrative Law Judge. On Mar. 11, 1974, the Commission also denied the request of A&P for reconsideration of its motion for a stay pending Commission ruling on A&P's request for reexamination of the Trade Regulation Rule. On Apr. 16, 1974, the National Association Of Food Chains filed a motion with the undersigned to intervene in the proceeding. This motion was denied on May 1, 1974.

On Apr. 29, 1974, A&P moved for dismissal of the complaint insofar as it alleged violation of Section 12 of the Federal Trade Commission Act. The motion was grounded on the contention that the complaint, as amplified by responses of complaint counsel to A&P's requests for admissions, did not, as a matter of law, allege conduct violative of Section 12. The undersigned deferred ruling on this motion until the filing of the initial decision, and it will be disposed of herein.

Pursuant to motion of complaint counsel on May 15, 1974, official notice was taken of the Trade Regulation Rule on "Retail Food Store Advertising and Marketing Practices" and, for a limited purpose, of certain documents in the record thereof.

On Apr. 17, 1974, both A&P and the National Association Of Food Chains filed suit in the United States District Court for the Southern District of New York to enjoin the Commission from (1) further proceeding in this matter, (2) enforcing the Trade Regulation Rule governing Retail Food Store Advertising and Marketing Practices, (3) further prosecuting the allegation of the complaint that Section 12 of the Federal Trade Commission Act had been violated, and (4) for an order affirmatively directing the Commission to clarify or amend the trade regulation rule. This suit for injunctive relief was dismissed by the United States District Court on May 16, 1974.

The case-in-chief was commenced on May 30, 1974, rather than May 21, 1974, because of the receipt in evidence by stipulation of the new and most recent Commission survey conducted in the late Spring of 1973, resulting in the withdrawal by complaint counsel of the offer in evidence of the North Carolina and the 1971 Commission surveys. As a result of the stipulation, the need to conduct evidentiary hearings on the admissibility of the 1973 Commission survey was obviated. The case-in-chief was concluded in all essential details on June 21, 1974.

The case-in-defense began July 15 and was completed on July 31, 1974, except for an expert witness who was heard on Aug. 28, 1974. Rebuttal and surrebuttal were completed on Sept. 4 and 5. A number of additional exhibits offered by A&P were received pursuant to motion on Oct. 2, 1974. The record was then closed for reception of evidence and a briefing schedule was issued.

Twenty-nine (29) witnesses testified, thirteen (13) were called by complaint counsel and sixteen (16) by A&P. Each side presented expert testimony. The record consists of three volumes of motions, pleadings, etc., approximately 2,952 pages of transcript, and nine volumes of exhibits, some of which are tables and charts, assembling data elsewhere in the record.

Basis of Decision

This matter is now before the undersigned for initial decision based on the allegations of the complaint, answer, evidence, and the proposed findings of fact, conclusions and briefs filed by A&P and complaint counsel. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having considered the entire record, and all the contentions of both sides, makes the following findings and conclusions and issues the order set out at the end hereof:

II

FINDINGS OF FACT

Respondent

1. The Great Atlantic & Pacific Tea Company, Inc., well known to everyone, is one of the two largest supermarket chains in the United States. A&P operates around 3,600 to 3,700 self-service retail food and grocery stores in 36 states, the District of Columbia and Canada (CX

270). The precise number of A&P stores in operation at any particular time varies due to the closing of old stores and the opening of new ones as business conditions change. Gross annual sales in the fiscal year ending Feb. 24, 1974, were nearly $6,747,000,000 (CX 272). A&P operates retail food stores in small and medium sized communities as well as in the nation's most populous metropolitan centers. Food stores range in size from ultra-modern supermarkets handling virtually every conceivable kind of food and grocery product, and surrounded by spacious parking facilities, to relatively small stores in downtown urban centers, such as New York City, with crowded aisles, packed shelves and display cases (RX 1085a-d, RX 1105a-f, and RX 1108a-c). During a typical week $110,000,000 worth of merchandise is sold (CX 270f and i) to between 16 and 20 million customers (Cairns, Tr. 1289) involving about 250,000,000 units of packaged goods, as well as enormous quantities of fresh meat, fish, produce, dairy products, etc. (RX 1031). Combined full-time and part-time employees approximate 100,000, the two categories being about equal in number (Stiffler, Tr. 2488). In addition to retail food stores, A&P operates bakeries, coffee-roasting facilities, dairy processing plants, meat packing plants, and many other types of food processing installations in many different states and localities in which it manufactures or packages food, grocery and other merchandise under its own brand names, example "Ann Page" (RX 1031). A&P retail food stores sell the packaged goods of independent suppliers located in various parts of the country, marketed under nationally or locally known brand names of such suppliers, as well as goods supplied to A&P for resale under A&P's brand names. A&P maintains national buying organizations in various parts of the country for basic items such as meat, fish, and produce (MacDonald, Tr. 880-82, 891-92). At the time of the complaint, A&P's national headquarters was in New York City, but has since been moved to Montvale, N.J. (Cairns, Tr. 1142; Stiffler, Tr. 2475). At all times relevant to this proceeding, A&P has maintained a substantial course of trade in food and grocery products, and other merchandise, in commerce as "commerce" is defined in the Federal Trade Commission Act, and has been in substantial competition in commerce with other firms and individuals engaged in the retail food and grocery business.

2. A&P's retail food stores are organized into 31 or 32 divisions, including a division for Canadian stores. A division is responsible for supervising the operation of A&P stores in a particular geographic area, usually centered on a major city. For example, the Cleveland Division, based in that city supervises A&P stores in northeastern Ohio (Weschler, Tr. 372). The Detroit Division supervises A&P stores in that city and elsewhere in the State of Michigan (MacDonald, Tr. 767-68).

Other divisions are located in Chicago, Indianapolis, Kansas City, Milwaukee, St. Louis, Toledo, Baltimore, Philadelphia, Scranton, New Orleans, Jacksonville, Boston, and many comparable cities. A&P's divisions are grouped into five regions, each headed by a regional president (Cairns, Tr. 1349). At the top of this organization is A&P's national headquarters.

3. Each division is headed by an executive entitled "vice president and general manager" (MacDonald, Tr. 767; Van Lentin, Tr. 2108). Each divisional vice president is assisted by subordinate executives responsible for sales, purchasing, store operation, warehousing, and other functions (MacDonald, Tr. 879-886; Van Lentin, Tr. 2110-15). The individual divisions of A&P are substantial operations. For example, the Bronx Division oversees 162 stores in New York City's five boroughs and suburban counties north of the city, has a work force of about 5,900 employees, and does about $350,000,000 worth of business annually (Van Lentin, Tr. 2108-2110).

4. Divisions in general prepare and place advertising for stores within their jurisdiction, maintain warehouses, arrange for the purchase of food and grocery products, and other merchandise, and supervise the distribution thereof to divisional stores (Browning, Tr. 1003, 1056-57). An exception is the New York City area where the headquarters of A&P's Eastern Region provides centralized purchasing, and handles the formulation and dissemination of advertising for the four metropolitan area divisions, Bronx, Long Island, Newark and Paterson, which in the aggregate operate about 588 stores (Burtis, Tr. 1834-38).

The Retail Food Industry

5. Official notice was taken for general and background purposes of information relating to the retail food industry set out in the Statistical Abstract of the United States for 1973, and in the Commission's statement of basis and purpose for the trade regulation rule effective July 12, 1971, on Retail Food Store Advertising and Marketing Practices.[1] Retail sales by food stores in 1972 were $95 billion of which $49.8 billion were made by multi-unit food chains, that is, those operating 11 or more stores. Food represents about 17.6 percent of total U.S. personal consumption expenditures, and sale of groceries and other foods represents about 20.3 percent of all retail trade. Expenditures for advertising by retail food stores amounted in 1970 to $674 million.

A[P's Advertising

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[1] No "adjudicative facts" material to this proceeding were the subject of official notice (see ruling on complaint counsel's motion to take official notice dated July 10, 1974, and ruling on respondent's conditional motion to take official notice dated Aug. 7, 1974).

6. In common with its major competitors, and the supermarket industry generally, A&P advertises extensively in various media, but predominately in mass-circulation metropolitan dailies, for the purpose of promoting its business and to induce the public to patronize its stores and to purchase the items advertised. Typically, advertisements are published in metropolitan areas at the beginning of the week, usually Monday, in both morning and evening papers, picturing or listing items and prices featured in the A&P stores in the market area through the first half of the week (Cairns, Tr. 1326; Burtis, Tr. 1846; Browning, Tr. 993; Hare, Tr. 694; Wyatt, Tr. 940; Loebsack, Tr. 166; Eliasen, Tr. 524). Advertisements are again published in the middle of the week, usually on Wednesday in the area's evening daily (example, CX 17) or in the major morning daily on Thursday, or in both, setting out the items and prices featured through the end of the week until store closings, generally on Saturday evening (Loebsack, Tr. 249; Eliasen, Tr. 524; Wyatt, *supra*). The mid-week placement is the week's main advertisement (MacDonald, Tr. 773; Browning, Tr. 993). The beginning of the week advertisements usually contain some items which are also contained in the mid-week advertisements (Weschler, Tr. 373; also Loebsack, *supra*).

7. Full page advertisements are commonly utilized, and multi-page advertisements are not infrequent, especially for the mid-week placement (CX 22a-c). A wide variety of different items, often as many as 120 to 130 per advertisement (CX 1-2, 4-5, 17-39), are typically offered drawn from the main categories of products, meat, fish and poultry, canned goods and groceries, fruits and vegetables, and miscellaneous household and other products. Certain items—"features"—are given particular prominence, with many others being simply "line items." "Line items" are national or regional brands which are included, usually in a line in the lower half of the newspaper advertisement, generally in return for an advertising allowance or discount (MacDonald, Tr. 787, 892-94; Weschler, Tr. 392-93; Browning, Tr. 1002). The record contains a substantial number of A&P's advertisements, as well as those of other supermarket chains (CX 1-2, 4-5, 17-39; RX 1112).

8. A key aspect of the newspaper advertising just described is the fact that the price of each advertised item is presented with prominence. The advertisements are price-oriented, and represent price competition in a real sense. Food and other products are frequently offered in these advertisements at substantial reductions, often on the presentation of a coupon included in the advertisement, and also at the "regular" price normally charged (Browning, Tr. 1020; Cairns, Tr. 1162-63, 1178; see also Dr. Goodman, Tr. 2589-2590).

Products offered at reduced prices make up a significant proportion of the total number of items advertised (Cairns, Tr. 1178), and efforts are made to feature prices on items on which A&P has a competitive advantage (Cairns, Tr. 1168). A&P's advertising appears to present shoppers with an opportunity to achieve major savings on many products. During 1973 A&P spent approximately $94,500,000 on advertising (CX 272a; Tr. 1143-44).

9. A&P's newspaper advertisements are prepared at the divisional level by the divisional sales department headed by a sales director. The divisional sales department decides the items to be put in advertisements to be published in a particular area, and the prices to be featured (Cairns, Tr. 1147; MacDonald, Tr. 781; Browning, Tr. 999-1001). National headquarters of A&P supplies model advertising layouts and general guidelines as to what should and should not appear in advertisements, and monitors the advertisements run by the divisions and their competitors (Cairns, Tr. 1161-65). The divisions, however, decide on the precise items and the prices. The divisional sales director is assisted by a staff of varying size, depending on the number of stores in the division. Such staff includes specialists in the purchase and sale of the different product categories handled, groceries, produce, meat, fish, dairy and bakery items, and other merchandise, such as health and beauty aids (Weschler, Tr. 382-83; MacDonald, Tr. 779-780; Gilbert, Tr. 2290-91; Niezgoda, Tr. 1942). Divisional sales directors are provided with assistant sales directors and advertising managers who supervise the layouts and coordinate with specialists and purchasing executives (Weschler and MacDonald, *supra;* Browning, Tr. 1000-01).

10. After deciding the items to feature in a particular advertisement, and the prices to list, the divisional sales department notifies the individual A&P stores in the division of the products to be advertised and the prices to be featured (Loebsack, Tr. 171; MacDonald, Tr. 825; Browning, Tr. 1031-32). In the New York City area, the Eastern Region performs this function for the New York area divisions. After receiving notice from the division sales departments advising of the items and prices to be advertised, individual A&P stores in the area are responsible for ordering whatever supplies of such items the store manager thinks necessary to make all advertised items available in his stores (Loebsack, Tr. 174-75; Weschler, Tr. 427-28; Cairns, Tr. 1280-82).

Representations In A[P's Advertising

11. A&P's newspaper advertising represented to the purchasing public that each item advertised could be purchased at the price advertised in any of A&P's retail food stores in the geographic area covered by the advertisement during the effective period announced, usually through the end of the week in which the advertisement was

run. Stated somewhat differently, the advertisements represented that the advertised items were readily available for sale at the prices advertised in each A&P store covered by the advertisements during their effective periods.

12. Consideration of any of A&P's newspaper advertisements, in the opinion of the undersigned, can lead to no other conclusion than the foregoing. For example, an advertisement which appeared in the *Cleveland Press* (CX 38a-b; CX 275zzl), on Apr. 18, 1973, offered Semi-Boneless Hams at 95 cents a lb., asparagus at 36 cents per lb., Grade-A Turkeys, 18 to 22 lb. size at 65 cents per lb., and fresh A&P 3.5 percent homogenized milk at 88 cents per gallon jug, among many other items. Advertising these items at the foregoing prices "Effective thru Saturday, April 21st at A&P 'WEO' Food Stores" represented to the public that the A&P stores in the Cleveland, Ohio, metropolitan area, had the items available for sale at the prices advertised, and that members of the purchasing public could buy any or all of such items at the advertised prices by going to any A&P store in the Cleveland area "thru Saturday, April 21st." Another advertisement, in the *Atlanta Journal* on May 2, 1974 (CX 34a-b; CX 275d-e), offered 2 percent low fat milk in a gallon jug at 95 cents, "Russet" potatoes in a 10 lb. bag for 99 cents, two pints of fresh strawberries for 89 cents, Florida oranges 5 lb. bag for 59 cents, "Maxwell House" Coffee 1 lb. bag 58 cents ("Limit 1 bag per Family"), and a host of other products at particular prices. Similarly, this advertisement represented to the purchasing public in the Atlanta, Ga., metropolitan area that the A&P stores located there had the foregoing items advertised for sale at the prices advertised, and that members of the public could buy any or all of such items at the advertised prices by going to any A&P store in the counties specified "through Saturday night May 5, 1973." Neither the existence of a "rain check" policy nor the fact that experienced shoppers may not expect perfection, and anticipate that on occasion an advertised item will not be available (Dr. Katona, Tr. 1755-56, 1787), alters the foregoing conclusion. The undersigned finds that the advertisements of A&P reproduced in this decision, and the many contained in the record, listing or depicting grocery, meat and other products at particular prices in a manner familiar to everyone, represented to the public that the advertised products could be bought at the prices listed in the advertisements at the A&P stores in the areas covered by the advertisements during the effective periods stated, or, if no effective periods were stated, during the several days immediately following publication of the advertisements. The undersigned further finds that the foregoing representations in A&P's advertisements were material, that they were disseminated to induce members of the public to

journey to and to patronize A&P's retail food stores, and that the advertisements had the tendency and capacity to cause this result.

The Commission's Survey

13. During Apr., May and June of 1973 the Commission conducted a survey of availability and pricing of advertised items in 640 retail stores and supermarkets of leading food chains in forty Standard Metropolitan Statistical areas. The purpose was to measure compliance with the Commission's trade regulation rule. 16 C.F.R. § 424.1. As in 1971, this survey was generally directed by the Commission's Bureau of Economics using personnel from the Commission's Regional Offices. Retail food stores and supermarkets were surveyed in 33 major metropolitan areas with populations over one million, and in seven smaller areas with populations over 700,000 and four firm concentration ratios believed to be in excess of 60 percent. Results were collected and tabulated. The survey instructions, results and underlying documents (CX 40-221), and the tabulations, based on them (CX 222-28), were received in evidence pursuant to stipulation (CX 264a-u; see also CX 263a-l).

14. Four stores of each of the four leading chains in each metropolitan area were surveyed. Included were 80 retail food stores of A&P in 20 metropolitan areas covered by 23 different advertisements (CX 17-39). The metropolitan areas were the following:

Atlanta
Baltimore
Birminghan
Buffalo
Chicago
Cleveland
Clifton-Paterson
Detroit
Indianapolis
Washington, D.C.
Kansas City
Louisville
Milwaukee
Newark
New Orleans
New York City
Philadelphia
Pittsburgh
Rochester
Toledo

15. The four stores to be surveyed for each chain, including A&P, in each metropolitan area were selected at random. Two lists derived from telephone books, trade directories, etc., were prepared of all the stores of each chain (1) within the city limits and (2) outside the city limits but within the standard metropolitan statistical area. A table of random numbers was then applied to each list and two "within city" and two "outside city" stores were drawn (CX 264b). With some exception, each store selected in this random manner was surveyed once during the two days following the publication of the mid-week newspaper advertisement, the items and prices being effective through the following Saturday. In the great majority of instances the mid-week advertisement was published on Wednesday, and the survey was

completed by late afternoon on Friday. In fact, 40 A&P stores were surveyed on Thursday, and 36 on Friday. The exception was Philadelphia where the advertisement checked was published on Sunday, and one store was surveyed on Monday, two on Tuesday, and one on Wednesday. The advertisements containing the items surveyed, as stated, are in the record (CX 17-39).

16. For purposes of the Commission's survey, the term "unavailable" was defined as meaning that a "unit of an advertised item" was (a) neither on display for sale anywhere in the part of the store open to the public, and (b) was not available on request from any storeroom or other part of the store not open to the public (CX 264i).

A "unit of an advertised item" was defined as a "can, bottle, package", or in the case of multiple offers, *e.g.*, "3 cans for a dollar," the unit was defined as "3 cans."

An item was not marked unavailable if the advertisement contained a disclaimer such as "item not available in stores without a bakery department."

The term "overpriced" was defined as meaning an advertised item marked with a price higher than the advertised price. In the case of coupon offers, that is, a reduced price offered on the presentation of a coupon, an item was not listed as overpriced where the difference between the price marked on the item and the advertised price did not exceed the amount of reduction promised with the coupon. Similarly, with "cents-off" items, that is, items where the advertisement, and often the label, offered a certain amount off the price marked on the unit, an item was not listed as overpriced where the difference between the price marked on the item and the advertised price did not exceed the amount of money promised "off" (CX 264j and k).

17. It was stipulated that the Commission's survey was soundly conceived, substantially complete, and well conducted "as a means to measure the phenomena which the survey results purport to measure" (CX 264s).

Unavailability and Overpricing Shown in Commission's Survey

18. Two Tables, which are copies of exhibits in evidence, are attached hereto setting out some of the results of the Commission's survey. Table I, CX 222a-c, "Availability and Pricing of Advertised Items: A&P by Store" shows the degree of "unavailability" and "overpricing" found in each of the 80 A&P stores surveyed in each of the 20 cities listed previously. Table III, CX 224a-c, "Average Results of Availability and Pricing of Advertised Items: All Chains by Chain" shows the degree of "unavailability" and "overpricing" overall for each chain surveyed. Other tables presenting the data from the survey in various ways are in the record but have not been reproduced herein.

Table II, CX 223a-e, shows the degree of "unavailability" and "overpricing" combined for the four stores of each chain, A&P and its leading competitors, in each city. Table IV A "Detailed Breakdown for A&P (Availability)" shows the absolute number and percentage of unavailable items combined for all A&P stores surveyed, and for each individual A&P store, together with a breakdown of the reasons advanced by store managers why items were not available (CX 225a-b). Table IV B "Detailed Breakdown for A&P (Pricing)" shows the absolute number and percentage of "overpriced" items combined for all A&P stores surveyed, and for each individual store together with certain details, including the number and percentage of units that were

Table I-*Availability and Pricing of Advertised Items: A&P By Store*

Chain and address of	Date and time of survey	Surveyor's name	Total no. items surveyed (Line 13)	No. items unavailable (Line 27A)	Unavailable as percent of total	No. items overpriced (Line 28 A)	No. over-priced as percent of total	Total unavail. or overpriced (col. 4 & 6)	Overpriced or unavail. as percent of total	No. items underpriced (Line 28 D)	Underpriced as percent of total
Atlanta											
1. #8, 1250 W. Paces Ferry Rd. N.W.	5-4 AM	Feagler	112	4	3.6	9	8.0	13	11.6	3	2.7
2. #37, 3871 Peachtree Rd. N.E.	5-4 PM	Feagler	112	1	0.9	2	1.8	3	2.7	1	0.9
3. #51, 4462 Jonesboro Rd.	5-3 AM	Feagler	112	2	1.8	7	6.3	9	8.0	1	0.9
4. #98, 1000 Main St.	5-3 PM	Feagler	112	11	9.8	6	5.4	17	15.2	2	1.8
Baltimore											
1. #804, 5510 Baltimore Pike	4-20 PM	McDonough	185	18	9.7	7	3.8	25	13.5	2	1.1
2. #809, 2711 Foster Ave.	4-20 AM	McDonough	185	21	11.4	2	1.1	23	12.4	0	—
3. #833, 6836 Reisterstown Rd.	4-19 AM	McDonough	185	21	11.4	7	3.8	28	15.1	1	0.5
4. #913, Rte. 140 & Engler Rd.	4-19 PM	McDonough	185	14	7.6	2	1.1	16	8.6	0	—
Birmingham											
1. #16, 728 N. 18th Street	5-10 PM	Feagler	118	15	12.7	6	5.1	21	17.8	3	2.5
2. #19, 4260 Cahaba Heights Rd.	5-10 AM	Feagler	118	8	6.8	7	5.9	15	12.7	6	5.1
3. #23, 137 6th Ave. S.W.	5-11 AM	Feagler	118	23	19.5	3	2.5	26	22.0	2	1.7
4. #32, 718 Bank Street	5-10 PM	Feagler	118	25	21.2	1	0.8	26	22.0	1	0.8
Buffalo											
1. #8, 118 Grant St.	6-7 PM	Woocker	114	6	5.3	1	0.9	7	6.1	1	0.9
2. #9, Central Park Plaza	6-7 PM	Woocker	114	10	8.8	1	0.9	11	9.6	0	—
3. #28, 33 Legum Drive	6-7 PM	Woocker	114	1	0.9	5	4.4	6	5.3	3	2.6
4. #34, 791 Center St.	6-8 AM	Woocker	114	2	1.8	7	6.1	9	7.9	1	0.9
Chicago											
1. #001, 1901 Glenview Road	5-11 PM	Brown	133	8	6.0	8	6.0	16	12.0	3	2.3
2. #002, 1876 1st St.	5-11 AM	Brown	133	6	4.5	10	7.5	16	12.0	6	4.5
3. #009, 319 E. 103rd St.	5-10 AM	Brown	133	20	15.0	8	6.0	28	21.1	5	3.8
4. #010, 8031 S. Racine Ave.	5-10 PM	Brown	133	23	17.3	10	7.5	33	24.8	3	2.3
Cleveland											
1. #230, 10310 St. Clair	4-19 AM	Plottner	138	45	32.6	15	10.9	60	43.5	3	2.2
2. #232, 4940 Turney Rd.	4-19 PM	Plottner	138	13	9.4	4	2.9	17	12.3	2	1.4
3. #237, 15770 Broadway Ave.	4-20 PM	Plottner	138	28	20.3	5	3.6	33	23.9	2	1.4
4. #307, 14035 Puritas Ave.	4-20 AM	Plottner	138	10	7.2	3	2.2	13	9.4	5	3.6
Clifton-Patterson											
1. #661, Rt. 46	5-11 PM	Karlin	136	8	5.9	10	7.4	18	13.2	1	0.7
2. #663, 396 Demerest Ave.	5-11 AM	Karlin	136	12	8.8	8	5.9	20	14.7	2	1.5
3. #655, Wyckoff & Clinton Ave.	5-11 PM	Karlin	136	3	2.2	2	1.5	5	3.7	0	—
4. #739, 375 Union Ave.	5-11 PM	Karlin	136	18	13.2	3	2.2	21	15.4	0	—

Table I—*Availability and Pricing of Advertised Items: A&P By Store (cont'd)*

Chain and address of	Date and time of survey	Surveyor's name	Total no. items surveyed (Line 13)	No. items unavailable (Line 27A)	Unavailable as percent of total	No. items overpriced (Line 28 A)	No. over-priced as percent of total	Total unavail. or overpriced (col. 4 & 6)	Overpriced or unavail. as percent of total	No. items underpriced (Line 28 D)	Underpriced as percent of total
Detroit											
1. #12, 17120 Kercheval Ave.	5-24 PM	Kennedy	216	27	12.5	15	6.9	42	19.4	2	0.9
2. #105, 8234 Telegraph Ave.	5-25 AM	Kennedy	216	19	8.8	10	4.6	29	13.4	6	2.8
3. #126, 9911 E. Jefferson Ave.	5-24 AM	Kennedy	216	30	13.9	22	10.2	52	24.1	5	2.3
4. #229, 14815 E. Jefferson Ave.	5-24 PM	Kennedy	216	35	16.2	13	6.0	48	22.2	2	0.9
District of Columbia											
1. #901, 5452 Annapolis Rd.	4-12 PM	McDonough	230	15	6.5	3	1.3	18	7.8	2	0.9
2. #911, 6899 Geo. Palmer Hwy.	4-12 AM	McDonough	230	20	8.7	5	2.2	25	10.9	5	2.2
3. #956, 1729 Benning Rd. N.E.	4-13 AM	McDonough	230	32	13.9	5	2.2	37	16.1	1	0.4
4. #974, 500 12th St. S.E.	4-13 PM	McDonough	230	31	13.5	9	3.9	40	17.4	1	0.4
Indianapolis											
1. #1, 321 S. 1st St.	5-31 PM	Brown	95	2	2.1	2	2.1	4	4.2	0	—
2. #2, 4711 W. 30th St.	5-31 AM	Brown	95	3	3.2	1	1.0	4	4.2	1	1.0
3. #7, 1244 W. Main St.	5-31 PM	Brown	95	2	2.1	4	4.2	6	6.3	0	—
4. #7, 715 E. 38th St.	6-1 AM	Brown	95	3	3.2	1	1.0	4	4.2	0	—
Kansas City											
1. #10, 99th & Holmes	5-25 PM	Alvord	181	7	3.9	2	1.1	9	5.0	0	—
2. #36, 712 State Ave.	5-24 AM	Alvord	181	1	0.6	2	1.1	3	1.7	0	—
3. #69, 2508 Johnson Drive	5-24 PM	Alvord	181	8	4.4	1	0.6	9	5.0	2	1.1
4. #78, 11154 Blue Ridge Blvd.	5-25 AM	Alvord	181	7	3.9	2	1.1	9	5.0	1	0.6
Louisville											
1. #3, 786 Miller Ave.	5-17 PM	Cole	98	2	2.0	5	5.1	7	7.1	0	—
2. #7, 2421 W. Market	5-18 AM	Cole	98	2	2.0	1	1.0	3	3.1	1	1.0
3. #8, 1250 Bard Storow	5-17 PM	Cole	98	4	4.1	2	2.0	6	6.1	0	—
4. #37, Dixie Manor Shopping Center	5-17 AM	Cole	98	5	5.1	3	3.1	8	8.2	3	3.1
Milwaukee											
1. #009, 682 E. Wisconsin Ave.	5-18 PM	Brown	174	13	7.5	10	5.7	23	13.2	8	4.6
2. #010, 16895 Appleton	5-18 AM	Brown	174	5	2.9	7	4.0	12	6.9	5	2.9
3. #10, 2020 W. State St.	5-17 AM	Brown	174	18	10.3	14	8.0	32	18.4	3	1.7
4. #022, 7610 W. Capitol	5-17 PM	Brown	174	5	2.9	2	1.1	7	4.0	7	4.0
Newark											
1. #915, 217 Harrison St.	5-3	Tedeschi	114	1	0.9	0	—	1	0.9	0	—
2. #943, 409 Main St.	5-3 —	Tedeschi	114	12	10.5	5	4.4	17	14.9	0	—
3. 278 S. Orange Ave.	5-3 PM	Kirigin	114	22	19.3	5	4.4	27	23.7	1	0.9
4. 550 Orange St.	5-3 AM	Kirigin	114	26	22.8	12	10.5	38	33.3	3	2.6

Table I—*Availability and Pricing of Advertised Items: A&P By Store (cont'd)*

Chain and address of	Date and time of survey	Surveyor's name	Total no. items surveyed (Line 13)	No. items unavailable (Line 27A)	Unavailable as percent of total	No. items overpriced (Line 28 A)	No. over-priced as percent of total	Total unavail. or overpriced (col. 4 & 6)	Overpriced or unavail. as percent of total	No. items underpriced (Line 28 D)	Underpriced as percent of total
New Orleans											
1. #54, 725 Veterans Highway	6-14 PM	Aquila	47	5	10.6	2	4.3	7	14.9	0	—
2. #71, 701 Royal Street	6-14 PM	Aquila	47	7	14.9	1	2.1	8	17.0	0	—
3. #72, 5330 St. Claude Ave.	6-14 PM	Aquila	47	4	8.5	3	6.4	7	14.9	0	—
4. 4525 West Bank Expwy.	6-14 AM	Chandler	47	8	17.0	0	—	8	17.0	0	—
New York City											
1. #166, 482-490 Mamaroneck Ave.	4-27 AM	Merolla	113	6	5.3	0	—	6	5.3	6	5.3
2. #175, 318 East Third St.	4-27 PM	Merolla	113	29	25.7	6	5.3	35	31.0	3	2.7
3. #525, 41-02 New Utrecht Ave.	4-26 PM	Merolla	114	4	3.5	0	—	4	3.5	0	—
4. #913, 680 Arthur Kill Road	4-27 AM	Paul	93	15	16.1	2	2.2	17	18.3	1	1.1
Philadelphia											
1. #46, 1350 Washington Lane	4-18 AM	Taggart	151	19	12.6	2	1.3	21	13.9	0	—
2. #48, 1201 Filbert St.	4-17 AM	Taggart	151	19	12.6	13	8.6	32	21.2	4	2.6
3. #92, 30 E. State St.	4-17 PM	Taggart	151	18	11.9	7	4.6	25	16.6	0	—
4. #158, 1315 State Road	4-16 PM	Taggart	150	27	18.0	4	2.7	31	20.7	1	0.7
Pittsburgh											
1. #6, 302 1st St.	4-20 AM	Shapiro	141	14	9.9	0	—	14	9.9	1	0.7
2. #21, 2571 Wenzell Ave.	4-19 AM	Shapiro	141	11	7.8	0	—	11	7.8	1	0.7
3. #87, 2900 Stayton St.	4-19 PM	Shapiro	141	10	7.1	2	1.4	12	8.5	0	—
4. #275, 741 Miller Ave.	4-20 PM	Shapiro	141	21	14.9	0	—	21	14.9	0	—
Rochester											
1. #37, 48 Spencerport Rd.	6-1 PM	Woocher	68	9	13.2	3	4.4	12	17.6	1	1.5
2. #300, 50 N. Main St.	5-31 PM	Woocher	68	6	8.8	5	7.4	11	16.2	1	1.5
3. #380, 1000 N. Clinton Ave.	6-1 AM	Woocher	69	9	13.0	1	1.4	10	14.5	2	2.9
4. #381, 131 S. Main St.	5-31 PM	Woocher	69	7	10.1	1	1.4	8	11.6	2	2.9
Toledo											
1. #1, 245 Golden Gate	5-10 PM	Cole	140	4	2.9	2	1.4	6	4.3	4	2.9
2. #10, 2304 Lagrange	5-10 AM	Cole	140	6	4.3	1.3	9.3	19	13.6	4	2.9
3. #35, 5838 Monroe	5-11 PM	Cole	140	3	2.1	7	5.0	10	7.1	7	5.0
4. #69, 5006 Lewis	5-11 AM	Cole	140	6	4.3	6	4.3	12	8.6	2	1.4

Table III — *Average Results of Availability and Pricing of Advertised Items: All Chains By Chain*

	Chain	No. cities in which chain surveyed	No. stores surveyed	Total no. items surveyed (Line 13)	No. items unavailable (Line 27 A)	Unavailable as percent of total	No. items overpriced (Line 28 A)	No. over-priced as percent of total	Total unavail. or overpriced (col. 4 & 6)	Overpriced or unavail. as percent of total	No. items underpriced (Line 28 D)	Underpriced as percent of total
1.	A.J. Bayless	1	4	496	4	0.8	88	17.7	92	18.6	0	—
2.	A&P	20	80	10,798	1,000	9.3	402	3.7	1,402	13.0	158	1.5
3.	Acme Super Saver (Alpha Beta)	8	32	5,848	247	4.2	145	2.5	392	6.7	34	0.6
4.	Albertson's	3	12	1,432	143	10.0	411	28.7	554	38.7	28	2.0
5.	Applebaum's (Target)	2	8	384	6	1.6	4	1.0	10	2.6	0	—
6.	Art Thompson's Food City	1	4	584	6	1.0	76	13.0	82	14.0	0	—
7.	Big Apple	1	4	368	12	3.3	12	3.3	24	6.5	2	0.5
8.	Big Bear	1	4	468	23	4.9	11	2.4	34	7.3	15	3.2
9.	Big "C"	1	4	180	3	1.7	22	12.2	25	13.9	4	2.2
10.	Bohack	1	4	156	3	1.9	2	1.3	5	3.2	2	1.3
11.	Bruno's Food Stores	1	4	328	14	4.3	5	1.5	19	5.8	9	2.7
12.	Buddies	1	4	520	14	2.7	18	3.5	32	6.2	8	1.5
13.	Colonial Stores (Albers)	2	8	820	34	4.2	11	1.3	45	5.5	7	0.8
14.	Country Club Markets	1	4	488	6	1.2	4	0.8	10	2.0	1	0.2
15.	Farmer's	1	4	436	48	11.0	14	3.2	62	14.2	27	6.2
16.	Farmer Jacks	1	4	240	24	10.0	16	6.7	40	16.7	0	—
17.	First National Stores	1	4	588	54	9.2	7	1.2	61	10.4	8	1.4
18.	Fisher-Fazio-Costa (Dominicks)	2	8	1,064	28	2.6	28	2.6	56	5.3	12	1.1
19.	Food Basket	1	4	696	27	3.9	5	0.7	32	4.6	0	—
20.	Food Fair (Pantry Pride)	5	20	2,748	212	7.7	63	2.3	275	10.0	14	0.5
21.	Foodtown (Newark)	1	4	656	122	18.6	56	8.5	178	27.1	6	0.9
22.	Foodtown (Toledo)	1	4	688	24	3.5	2	0.3	26	3.8	4	0.6
23.	Fred Meyer	1	4	516	3	0.6	120	23.3	123	23.8	2	0.4
24.	Giant Eagle	1	4	392	32	8.2	3	0.8	35	8.9	2	0.5
25.	Giant Food	2	8	908	29	3.2	2	0.2	31	3.4	9	1.0
26.	Great Scott	1	4	388	9	2.3	3	0.8	12	3.1	3	0.8
27.	Grand Union	3	12	1,416	88	6.2	59	4.2	147	10.4	2	0.1
28.	H. E. B.	1	4	532	36	6.8	14	2.6	50	9.4	19	3.6
29.	Handy Andy	1	4	580	31	5.3	114	19.7	145	25.0	0	—
30.	Harvest Markets	1	4	472	35	7.4	1	0.2	36	7.6	1	0.2

Table III—*Average Results of Availability and Pricing of Advertised Items: All Chains (cont'd) By Chain*

Chain	No. cities in which chain surveyed	No. stores surveyed	Total no. items surveyed (Line 13)	No. items unavailable (Line 27 A)	Unavailable as percent of total	No. items overpriced (Line 28 A)	No. over-priced as percent of total	Total unavail. or overpriced (col. 4 & 6)	Overpriced or unavail. as percent of total	No. items underpriced (Line 28 D)	Underpriced as percent of total
31. Heinen's	1	4	444	3	0.7	15	3.4	18	4.1	0	
32. Jewel Foods (Star Markets-Boston)	2	8	560	15	2.7	10	1.8	25	4.5	4	0.7
33. Joseph's	1	4	264	11	4.2	9	3.4	20	7.6	2	0.8
34. Kash n' Karry	1	4	878	45	5.1	7	0.8	52	5.9	10	1.1
35. King Soopers (Fry's)	3	12	1,508	62	4.1	7	0.5	69	4.6	4	0.3
36. Kohl's	1	4	616	5	0.8	6	1.0	11	1.8	2	0.3
37. Kroger	11	44	7,692	541	7.0	269	3.5	810	10.5	98	1.3
38. Lewis and Coker	1	4	340	9	2.6	45	13.2	54	15.9	6	1.8
39. Liberal Supermarkets	1	4	500	37	7.4	23	4.6	60	12.0	13	2.6
40. Lucky	4	16	2,996	145	4.8	62	2.1	207	6.9	54	1.8
41. Marsh	1	4	780	19	2.4	8	1.0	27	3.5	3	0.4
42. Mayfair (El Rancho)	3	12	1,400	32	2.3	166	11.9	198	14.1	19	1.4
43. Milgram Food Stores	1	4	968	73	7.5	51	5.3	124	12.8	2	0.2
44. Minyard	1	4	388	20	5.2	31	8.0	51	13.1	9	2.3
45. National Tea (Loblaw's-Millers)	9	36	3,915	180	4.6	160	4.1	340	8.7	59	1.5
46. Pathmark	3	12	1,652	172	10.4	72	4.4	244	14.8	30	1.8
47. Penn Fruit	1	4	244	44	18.0	12	4.9	56	23.0	2	0.8
48. Pick n' Pay	1	4	724	59	8.2	16	2.2	75	10.4	2	0.3
49. Piggly-Wiggly	2	8	1,148	100	8.7	137	11.9	237	20.6	25	2.2
50. Publix	2	8	1,045	22	2.1	76	7.3	98	9.4	1	0.1
51. Purity Supreme	1	4	272	4	1.5	0	—	4	1.5	1	0.4
52. Q. F. I.	1	4	476	2	0.4	87	18.3	89	18.7	0	—
53. Raley's	1	4	396	1	0.3	97	24.5	98	24.7	1	0.3
54. Ralph's Market	1	4	672	15	2.2	20	3.0	35	5.2	14	2.1
55. Red Owl	2	8	712	27	3.8	8	1.1	35	4.9	9	1.3
56. Rice Foods	1	4	376	22	5.9	194	51.6	216	57.4	3	0.8
57. Safeway	14	56	10,355	315	3.0	549	5.3	864	8.3	80	0.8
58. Schnuck's	1	4	584	17	2.9	8	1.4	25	4.3	11	1.9
59. Schwegmann's	1	4	132	0	—	1	0.8	1	0.8	0	—
60. Scotty's	1	4	196	1	0.5	4	2.0	5	2.6	1	0.5

Table III—*Average Results of Availability and Pricing of Advertised Items: All Chains (cont'd) By Chain*

	Chain	No. cities in which chain surveyed	No. stores surveyed	Total no. items surveyed (Line 13)	No. items unavailable (Line 27 A)	Unavailable as percent of total	No. items overpriced (Line 28 A)	No. over-priced as percent of total	Total unavail. or overpriced (col. 4 & 6)	Overpriced or unavail. as percent of total	No. items underpriced (Line 28 D)	Underpriced as percent of total
61.	Star Markets (Rochester)	1	4	476	7	1.5	3	0.6	10	2.1	1	0.2
62.	Stater Bros.	1	4	620	19	3.1	94	15.2	113	18.2	3	0.5
63.	Stop and Shop	1	4	620	38	6.1	16	2.6	54	8.7	1	0.2
64.	Thorofare	1	4	240	14	5.8	0	—	14	5.8	2	0.8
65.	Thriftway	1	4	640	14	2.2	61	9.5	75	11.7	1	0.2
66.	Tom Thumb	1	4	396	7	1.8	127	32.1	134	33.8	6	1.5
67.	Tradewell	1	4	464	15	3.2	214	46.1	229	49.4	2	0.4
68.	Von's	1	4	764	18	2.4	26	3.4	44	5.8	8	1.0
69.	Waldbaums	1	4	288	24	8.3	4	1.4	28	9.7	2	0.7
70.	Wegman's	1	4	452	41	9.1	2	0.4	43	9.5	0	—
71.	Weingarten's	1	4	792	27	3.4	54	6.8	81	10.2	2	0.3
72.	Western Supermarkets	1	4	244	5	2.0	25	10.2	30	12.3	3	1.2
73.	Winn Dixie	5	20	2,092	59	2.8	61	2.9	120	5.7	19	0.9
74.	Wrigley	1	4	836	126	15.1	37	4.4	163	19.5	11	1.3
74	Totals	160	640	86,347	4,729	5.5	4,592	5.3	9,321	10.8	903	1.0

purchased at the higher price (CX 226a-f). Table II B "Average Results of Pricing of Advertised Items: All Chains" shows survey date on "overpricing" which distinguishes stores which claim to remark items advertised as reduced in price from stores which claim that adjustments are made at the check-out counter CX 227a-e). Table III B "Average Results of Pricing of Advertised Items: All Chains by Chain" shows the same data, but with all stores claiming to use either system combined for each chain (CX 228a-c).

19. In 80 A&P stores in the 20 cities listed, 10,798 items were surveyed and 1,402 items were found to be either unavailable or overpriced. Stated mathematically, 13 percent of A&P's advertised items were either not available at all, or were price marked with a price higher than that advertised. An average of 17.5 items per A&P store were either unavailable or overpriced. Broken down, 1,000 items out of the 10,798 surveyed were unavailable, about 9.3 percent, and 402 were overpriced, about 3.7 percent. Inasmuch as A&P's checkers are instructed to charge the price marked on the item, as discussed in greater detail later herein, the higher than advertised price marked on the item was the price charged the customer in most cases of overpriced items.

20. In 47 out of the 80 A&P stores surveyed over 10 percent of the advertised items were unavailable or overpriced, and in 27 A&P stores the figure was 15 percent or more. One or more of the four stores surveyed in Atlanta, Baltimore, Birmingham, Chicago, Cleveland, Clifton-Paterson, Detroit, Washington, D.C., Milwaukee, Newark, New Orleans, New York City, Philadelphia, and Rochester, had 15 percent or more of the advertised items unavailable or overpriced. In Birmingham, two stores out of four had over 20 percent unavailability or overpricing of advertised items. The same was true of Chicago, Cleveland, Detroit, Newark, and Philadelphia. In one store in Cleveland 43 percent of the advertised items were unavailable or overpriced, almost every other advertised item. In Newark one of the four stores surveyed had combined unavailability or overpricing of 33 percent, almost one item out of three, and in New York City one of the four stores had 31 percent unavailability and overpricing of advertised items, likewise close to one item out of three.

21. In terms of numbers of advertised items unavailable or overpriced the results were as follows:

Advertised Items Unavailable	No. of A&P Stores
25 or more	11
20-24	8
15-19	10
10-14	11

5-9	21
1-4	19
	80

Advertised Items Overpriced	No. of A&P Stores
15 or more	3
10-14	10
5-9	25
1-4	35
None	7
	80

See CX 222a-c, attached.

22. As previously noted, the record contains the advertisements placed by A&P in the metropolitan dailies covering the markets surveyed. These advertisements show the exact products advertised and surveyed for unavailability in the subject 80 A&P stores (CX 17 through CX 39; see stipulation CX 264, para. 7). The record also contains photocopies of each of these A&P advertisements with the specific items circled in red which were found unavailable by the Commission's surveyors in *any* of the four A&P stores surveyed in the metropolitan areas in which each advertisement was published (CX 275a-qq). Two of these exhibits have been reproduced in this decision. They are the advertisements published in the *Atlanta Journal* on Wednesday, May 2, 1973 (CX 275d-e), and the advertisement published in the *Detroit News* on May 23, 1973 (CX 275s-u). The exhibits provide an illustration of the type of advertised item found unavailable in A&P's stores by the surveyors.[2] Such items were of all kinds covering a wide range of products. The *Atlanta Journal* advertisement (CX 275d-e), reproduced herein, should be compared with the list of unavailable products contained in Finding 24, *infra*, and the *Detroit News* advertisement (CX 275s-u) with the list in Finding 26.

23. The record also contains the A&P advertisements published in the *Birmingham News*, the *Chicago-Tribune*, the *Cleveland Press*, the *New Jersey Record*, the *Detroit News*, the *Washington Star-News*, the *Newark Star-Ledger*, the *New Orleans States-Item*, the *New York Daily News*, the *Staten Island Advance*, the *Philadelphia Inquirer*, and the *Pittsburgh Press*, which have the items circled in red which were found unavailable in *specific, individual* A&P stores surveyed in the metropolitan areas served by the foregoing dailies (CX 275uu-zz22).

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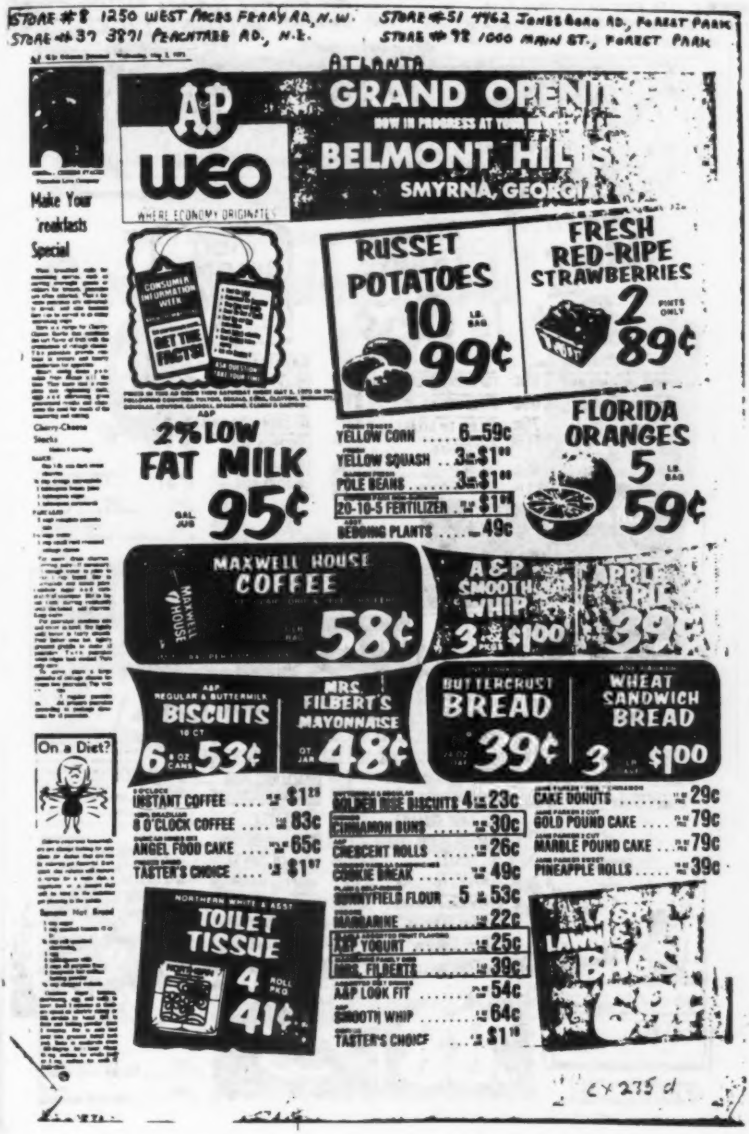
[2] The process of printing has changed the red lines around unavailable products on the original exhibits to black lines on the copies herein, making such products less obvious and in some instances difficult to distinguish from items having black borders in the original advertisements. To avoid any uncertainty, the unavailable products have been enumerated in the text, and such lists should be checked against the reproduced advertisements.

Two of these advertisements (CX 275zz-zz1; CX 275zz11-zz12) have been reproduced in this decision as examples of the advertised items unavailable in specific stores. The first advertisement, published in the *Cleveland Press* on



STORE #8 1250 WEST PACES FERRY RD, N.W.
STORE #37 3871 PEACHTREE RD., N.E.
STORE #51 4962 JONESBORO RD., FOREST PARK
STORE #78 1000 MAIN ST., FOREST PARK

ATLANTA

Make Your
reakfasts
Special

Cherry-Cheese Snacks

On a Diet?

A&P WEO

WHERE ECONOMY ORIGINATES

GRAND OPENI

NOW IN PROGRESS AT YOUR

BELMONT HIL S

SMYRNA, GEORGI

CONSUMER INFORMATION WEEK

GET THE FACTS!

ASK QUESTIONS TAKE YOUR TIME

RUSSET POTATOES 10 LB. BAG 99¢

FRESH RED-RIPE STRAWBERRIES 2 PINTS ONLY 89¢

A&P 2% LOW FAT MILK GAL. JUG 95¢

YELLOW CORN 6 59c

YELLOW SQUASH .. 3 $\$1^{00}$

POLE BEANS .... 3 $\$1^{00}$

20-10-5 FERTILIZER . $\$1^{99}$

BEDDING PLANTS 49c

FLORIDA ORANGES 5 LB. BAG 59¢

MAXWELL HOUSE COFFEE 58¢

A&P SMOOTH WHIP 3 $\$1^{00}$

APPL 39

A&P REGULAR & BUTTERMILK BISCUITS 10 CT 6 8 OZ CANS 53¢

MRS. FILBERT'S MAYONNAISE QT. JAR 48¢

BUTTERCRUST BREAD 39¢

WHEAT SANDWICH BREAD 3 $\$1^{00}$

INSTANT COFFEE .... $\$1^{25}$

8 O'CLOCK COFFEE 83c

ANGEL FOOD CAKE 65c

TASTER'S CHOICE .... $\$1^{07}$

BISCUITS 4 23c

CINNAMON BUNS 30c

CRESCENT ROLLS 26c

COOKIE BREAK 49c

SUNNYFIELD FLOUR . 5 53c

MARGARINE 22c

A&P YOGURT 25c

MRS. FILBERTS 39c

A&P LOOK FIT 54c

SMOOTH WHIP 64c

TASTER'S CHOICE ... $\$1^{10}$

CAKE DONUTS 29c

GOLD POUND CAKE 79c

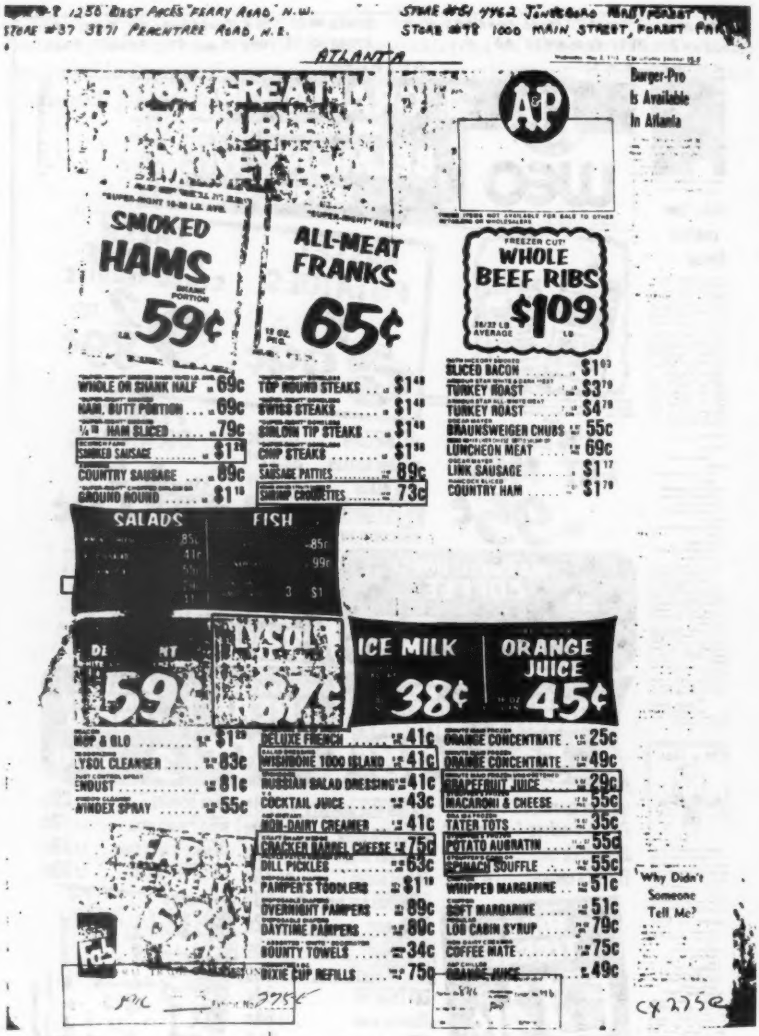
MARBLE POUND CAKE ... 79c

PINEAPPLE ROLLS 39c

NORTHERN WHITE & ASST TOILET TISSUE 4 ROLL PKG 41¢

LAWN B 69

CX 275 d



[illegible]-8 1250 WEST PACES FERRY ROAD, N.W.
STORE #37 3871 PEACHTREE ROAD, N.E.

STORE #51 4462 JONESBORO ROAD, FOREST
STORE #98 1000 MAIN STREET, FOREST PA

ATLANTA

A&P

Burger-Pro Is Available In Atlanta

SMOKED HAMS SHANK PORTION LB. 59¢

ALL-MEAT FRANKS 12 OZ. PKG. 65¢

FREEZER CUT WHOLE BEEF RIBS 28/32 LB AVERAGE $\$1^{09}$ LB

WHOLE OR SHANK HALF	69c
HAM, BUTT PORTION	69c
¼ LB HAM SLICED	79c
SMOKED SAUSAGE	$\$1^{29}$
COUNTRY SAUSAGE	89c
GROUND ROUND	$\$1^{18}$
TOP ROUND STEAKS	$\$1^{48}$
SWISS STEAKS	$\$1^{48}$
SIRLOIN TIP STEAKS	$\$1^{48}$
CHIP STEAKS	$\$1^{38}$
SAUSAGE PATTIES	89c
SHRIMP CROQUETTES	73c
SLICED BACON	$\$1^{03}$
TURKEY ROAST	$\$3^{79}$
TURKEY ROAST	$\$4^{79}$
BRAUNSWEIGER CHUBS	55c
LUNCHEON MEAT	69c
LINK SAUSAGE	$\$1^{17}$
COUNTRY HAM	$\$1^{79}$

SALADS

FISH

ICE MILK 38¢

ORANGE JUICE 45¢

MOP & GLO	$\$1^{09}$
LYSOL CLEANSER	83c
ENDUST	81c
WINDEX SPRAY	55c
DELUXE FRENCH	41c
WISHBONE 1000 ISLAND	41c
RUSSIAN SALAD DRESSING	41c
COCKTAIL JUICE	43c
NON-DAIRY CREAMER	41c
CRACKER BARREL CHEESE	75c
DILL PICKLES	63c
PAMPER'S TODDLERS	$\$1^{19}$
OVERNIGHT PAMPERS	89c
DAYTIME PAMPERS	89c
BOUNTY TOWELS	34c
DIXIE CUP REFILLS	75c
ORANGE CONCENTRATE	25c
ORANGE CONCENTRATE	49c
GRAPEFRUIT JUICE	29c
MACARONI & CHEESE	55c
TATER TOTS	35c
POTATO AUGRATIN	55c
SPINACH SOUFFLE	55c
WHIPPED MARGARINE	51c
SOFT MARGARINE	51c
LOG CABIN SYRUP	79c
COFFEE MATE	75c
ORANGE JUICE	49c

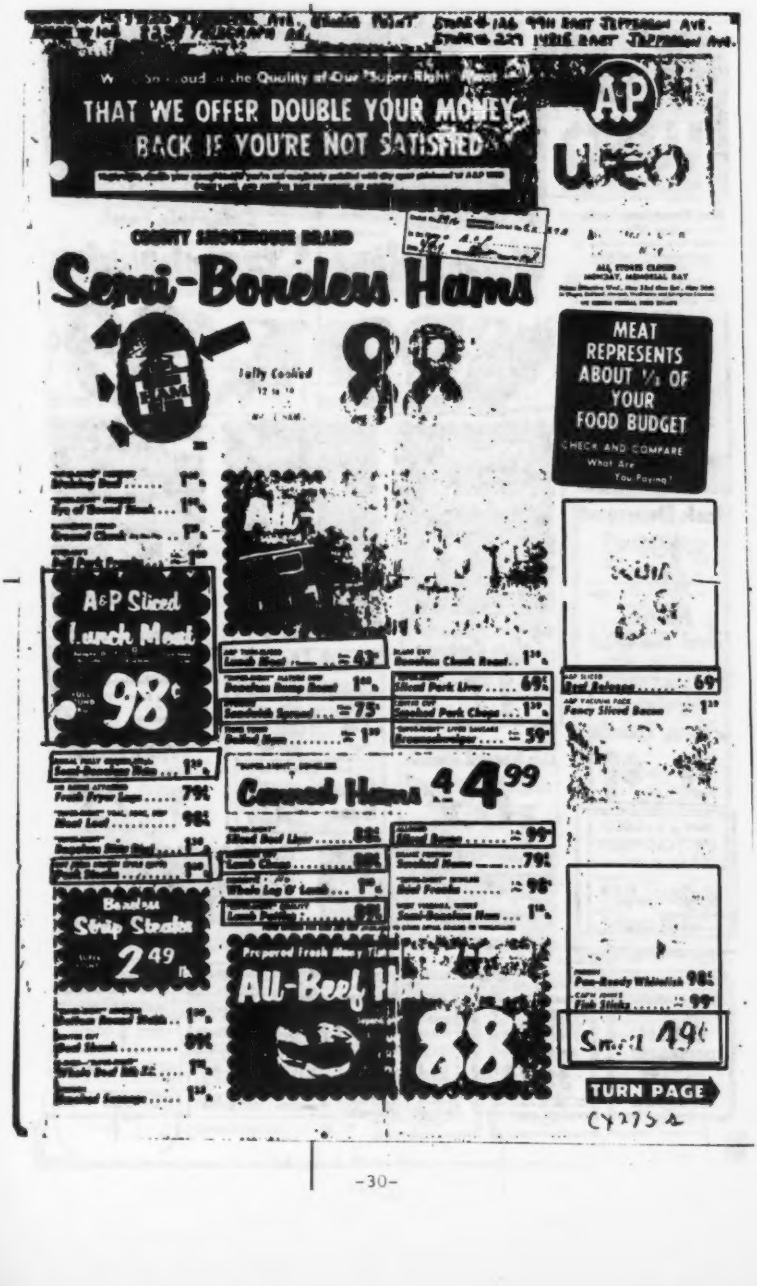
Fab 68¢

Why Didn't Someone Tell Me?

FTC Exhibit No. 275

CX 275

-29-



Store # 126 9911 East Jefferson Ave.
Store # 229 14916 East Jefferson Ave.

We're So Proud of the Quality of Our "Super-Right" Meat

THAT WE OFFER DOUBLE YOUR MONEY BACK IF YOU'RE NOT SATISFIED

A&P

ALL STORES CLOSED MONDAY, MEMORIAL DAY

COUNTY SMOKEHOUSE BRAND

Semi-Boneless Hams

Fully Cooked

88

MEAT REPRESENTS ABOUT ⅓ OF YOUR FOOD BUDGET

CHECK AND COMPARE What Are You Paying?

A&P Sliced Lunch Meat 98¢

Lunch Meat 43¢

Boneless Chuck Roast 1

Boneless Rump Roast 1

Sliced Pork Liver 69¢

Sandwich Spread 75¢

Smoked Pork Chops 1

Boiled Ham 1

Braunschweiger 59¢

Beef Bologna 69¢

Fancy Sliced Bacon 1

Semi-Boneless Ham 1

Fresh Fryer Legs 79¢

Meat Loaf 98¢

"Super-Right" Canned Hams 4 4.99

Sliced Beef Liver 88¢

Sliced Bacon 99¢

Lamb Chops 99¢

Smoked Hams 79¢

Whole Leg O' Lamb 1

Beef Franks 98¢

Lamb Patties 99¢

Semi-Boneless Ham 1

Boneless Strip Steaks 2.49 lb.

Prepared Fresh Many Times Daily All-Beef Ham 88¢

Boneless Round Steak 1

Beef Shank 89¢

Whole Beef Rib 1

Smoked Sausage 1

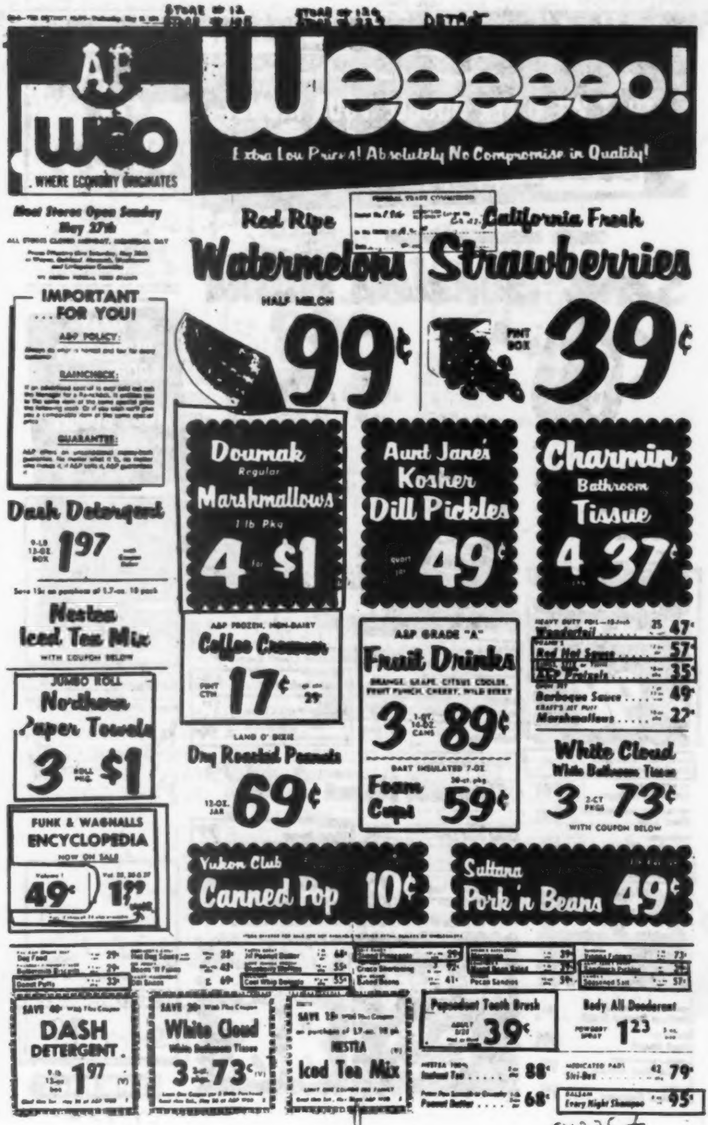
Pan-Ready Whitefish 98¢

Fish Sticks 99¢

Small 49¢

TURN PAGE

CY275 A



STORE NO 12

STORE NO 125

STORE NO 124

DETROIT

A&P WEO . WHERE ECONOMY ORIGINATES

Weeeeeo!

Extra Low Prices! Absolutely No Compromise in Quality!

Most Stores Open Sunday May 27th

IMPORTANT ...FOR YOU!

A&P POLICY:

RAINCHECK:

GUARANTEE:

Red Ripe Watermelons HALF MELON 99¢

California Fresh Strawberries PINT BOX 39¢

Doumak Regular Marshmallows 1 lb Pkg 4 for $1

Aunt Jane's Kosher Dill Pickles 49¢

Charmin Bathroom Tissue 4 37¢

Dash Detergent 9-LB 13-OZ BOX 1.97

Nestea Iced Tea Mix WITH COUPON BELOW

JUMBO ROLL Northern Paper Towels 3 ROLL PKG. $1

FUNK & WAGNALLS ENCYCLOPEDIA NOW ON SALE Volume 1 49¢ 1.99

A&P FROZEN, NON-DAIRY Coffee Creamer PINT CTN 17¢

LAND O' DIXIE Dry Roasted Peanuts 12-OZ. JAR 69¢

A&P GRADE "A" Fruit Drinks ORANGE, GRAPE, CITRUS COOLER, FRUIT PUNCH, CHERRY, WILD BERRY 3 1-QT. 14-OZ. CANS 89¢

DART INSULATED 7-OZ Foam Cups 59¢

Wonderfoil 47¢

Red Hot Sauce 57¢

A&P Pretzels 35¢

Barbeque Sauce 49¢

KRAFT'S JET PUFF Marshmallows 27¢

White Cloud White Bathroom Tissue 3 2-CT PKGS 73¢ WITH COUPON BELOW

Yukon Club Canned Pop 10¢

Sultana Pork 'n Beans 49¢

Dog Food 29¢

Donut Puffs 33¢

Crisco Shortening

Pecan Sandies

Seasoned Salt 57¢

SAVE 40¢ With This Coupon DASH DETERGENT 9-lb. 13-oz. box 1.97

SAVE 20¢ With This Coupon White Cloud White Bathroom Tissue 3 2-ct. pkgs. 73¢

SAVE 15¢ With This Coupon NESTEA Iced Tea Mix LIMIT ONE COUPON PER FAMILY

Pepsodent Tooth Brush ADULT SIZE 39¢

Body All Deodorant POWDERY SPRAY 1.23

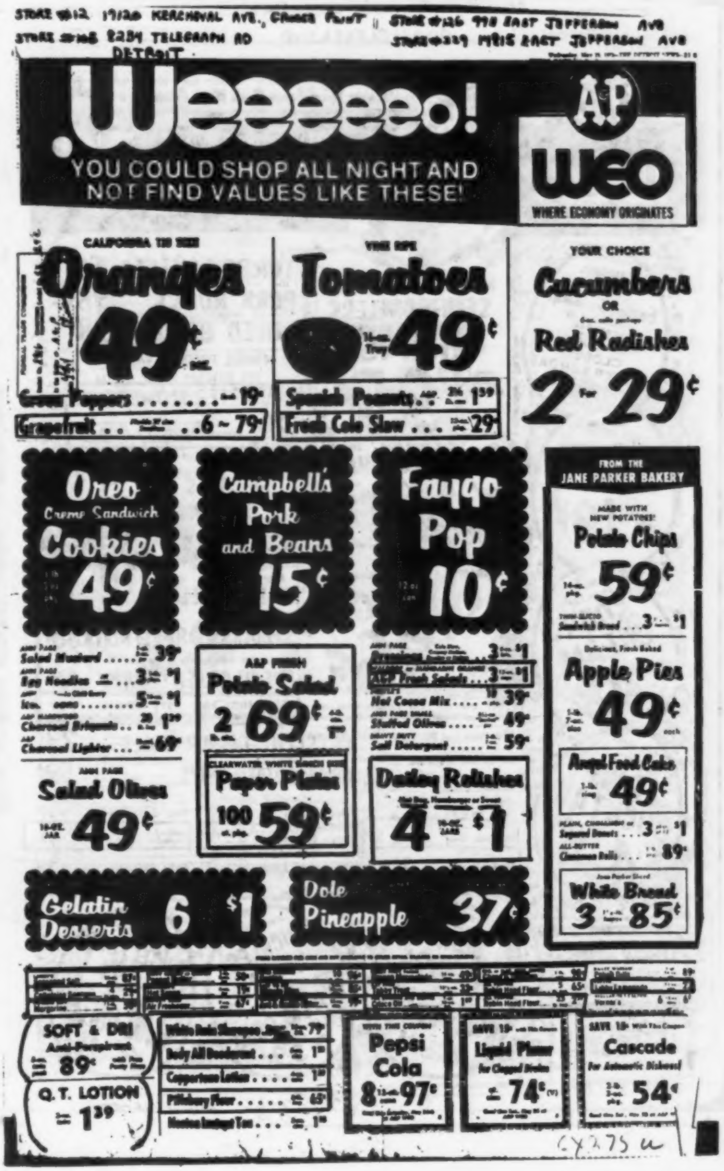
NESTEA 100% Instant Tea 88¢

MEDICATED PADS Stri-Dex 42 79¢

Peanut Butter 68¢

BALSAM Every Night Shampoo 95¢

CX 275 A



STORE #012 19120 KERCHEVAL AVE., GROSSE POINT || STORE #126 998 EAST JEFFERSON AVE
STORE #108 8234 TELEGRAPH RD
DETROIT
STORE #329 14815 EAST JEFFERSON AVE

Weeeeeo!

YOU COULD SHOP ALL NIGHT AND NOT FIND VALUES LIKE THESE!

A&P WEO WHERE ECONOMY ORIGINATES

CALIFORNIA 113 SIZE **Oranges** 49¢ DOZ.

Green Peppers .... 19¢

Grapefruit .. ..6 for 79¢

VINE RIPE **Tomatoes** 14-oz. Tray 49¢

Spanish Peanuts 1³⁹

Fresh Cole Slaw ... 29¢

YOUR CHOICE **Cucumbers** OR **Red Radishes** 2 For 29¢

Oreo Creme Sandwich **Cookies** 49¢

Campbell's Pork and Beans 15¢

Faygo Pop 12 oz. can 10¢

FROM THE JANE PARKER BAKERY

MADE WITH NEW POTATOES! **Potato Chips** 59¢

Sandwich Bread ...3 for $1

Delicious, Fresh Baked **Apple Pies** 49¢ each

Angel Food Cake 49¢

Sugared Donuts ...3 for $1

ALL-BUTTER Cinnamon Rolls ... 89¢

Jane Parker Sliced **White Bread** 3 for 85¢

ANN PAGE Salad Mustard ..... 39¢

ANN PAGE Egg Noodles ...3 for $1

Charcoal Briquets .. 1³⁹

A&P Charcoal Lighter ... 69¢

ANN PAGE **Salad Olives** 16-OZ. JAR 49¢

A&P FRESH **Potato Salad** 2 lb. ctn. 69¢

CLEARWATER WHITE **Paper Plates** 100 ct. pkg. 59¢

ANN PAGE Dressings ... 3 for $1

A&P Fresh Salads ... 3 for $1

Hot Cocoa Mix .... 39¢

ANN PAGE Stuffed Olives .... 49¢

HEAVY DUTY Salt Detergent ..... 59¢

Dailey Relishes Hot Dog, Hamburger or Sweet 4 16-OZ. JARS $1

Gelatin Desserts 6 $1

Dole Pineapple 37¢

SOFT & DRI Anti-Perspirant 89¢

Q. T. LOTION 1³⁹

White Rain Shampoo ... 79¢

Body All Deodorant ... 1¹⁹

Coppertone Lotion 1¹⁹

Pillsbury Flour ...... 65¢

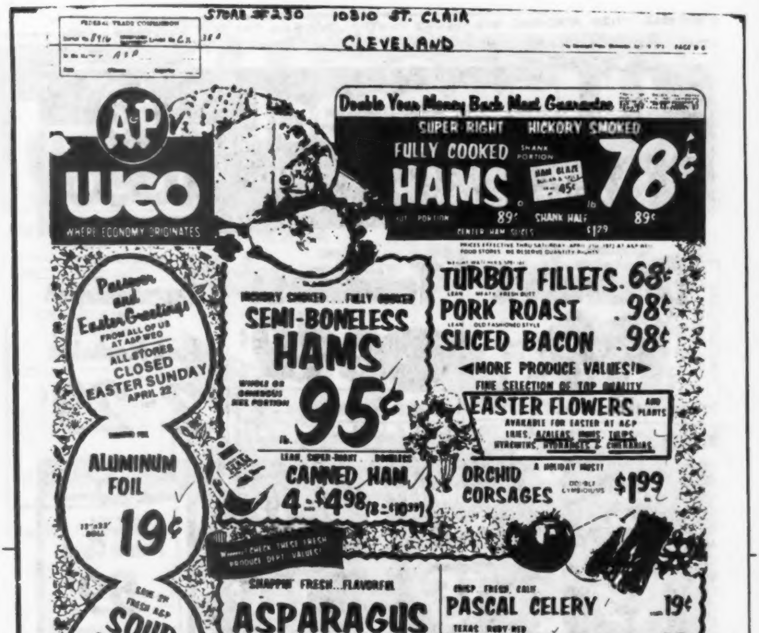
Nestea Instant Tea ... 1¹⁹

WITH THIS COUPON **Pepsi Cola** 8 for 97¢

SAVE 15¢ with this Coupon **Liquid Plumr** for Clogged Drains 74¢

SAVE 15¢ With This Coupon **Cascade** for Automatic Dishwasher 54¢

CX 275 a



STORE #230 10310 ST. CLAIR

CLEVELAND

FEDERAL TRADE COMMISSION

A&P

WEO

WHERE ECONOMY ORIGINATES

Double Your Money Back Meat Guarantee

SUPER-RIGHT HICKORY SMOKED

FULLY COOKED HAMS SHANK PORTION lb. 78¢

HAM GLAZE 45¢

BUTT PORTION 89¢ SHANK HALF 89¢

CENTER HAM SLICES $1.29

TURBOT FILLETS .68¢

LEAN MEATY FRESH BUTT

PORK ROAST .98¢

LEAN OLD FASHIONED STYLE

SLICED BACON .98¢

◄MORE PRODUCE VALUES!►

FINE SELECTION OF TOP QUALITY

EASTER FLOWERS AND PLANTS

AVAILABLE FOR EASTER AT A&P

LILIES, AZALEAS, MUMS, TULIPS, HYACINTHS, HYDRANGEAS & CINERARIAS

A HOLIDAY MUST!

ORCHID CORSAGES $1.99

Passover and Easter Greetings FROM ALL OF US AT A&P WEO

ALL STORES CLOSED EASTER SUNDAY APRIL 22.

HICKORY SMOKED . . . FULLY COOKED

SEMI-BONELESS HAMS

WHOLE OR HALF PORTION lb. 95¢

LEAN, SUPER-RIGHT . . . BONELESS

CANNED HAM 4 $4.98 (8 $10.99)

ALUMINUM FOIL 19¢

WOW!! CHECK THESE FRESH PRODUCE DEPT. VALUES!

SNAPPIN' FRESH...FLAVORFUL

ASPARAGUS lb. 36¢

IDEAL FOR YOUR HOLIDAY VEGETABLE!

CRISP, FRESH, CALIF.

PASCAL CELERY 19¢

TEXAS RUBY RED

SEEDLESS GRAPEFRUIT 8 FOR 88¢

GREAT FOR YOUR HOLIDAY RELISH TRAY

FRESH GREEN ONIONS 10¢

HORSERADISH ROOT .59¢ RED BEETS 29¢

SAVE 2¢ FRESH A&P SOUR CREAN 48¢

HUNT'S FRUIT COCKTAIL 4 $1

White Angel Food Mix 49¢

Duncan Hines Muffin Mix 49¢

Coconut Flakes 39¢

Fresh Apple Pie 59¢

Hot Cross Buns 55¢

Whipped Dressing 3 $1.00

Our Own Tea Bags 89¢

CRESCENT DINNER ROLLS 29¢

CRISP POTATO CHIPS 59¢

Libby Cut Beets 5 $1.00

Libby's Beets 3 $1.00

Libby's Green Beans 29¢

Pickles 59¢

Kraft Dressing 59¢

Vegetable Salad 53¢

Mott's Applesauce 39¢

Tangy Applesauce 4 89¢

CLIP COUPONS

VALUABLE COUPON

BETTY CROCKER WHITE ANGEL FOOD MIX 49¢ WITH COUPON

VALUABLE COUPON

SAVE UP TO 20¢

HEAVY DUTY ALCOA FOIL 49¢ WITH COUPON

CORN 4 89¢

SWEET PEAS 4 $1

PICKLES 69¢

FRESH PACK

VLASIC DILLS PLAIN OR KOSHER 59¢

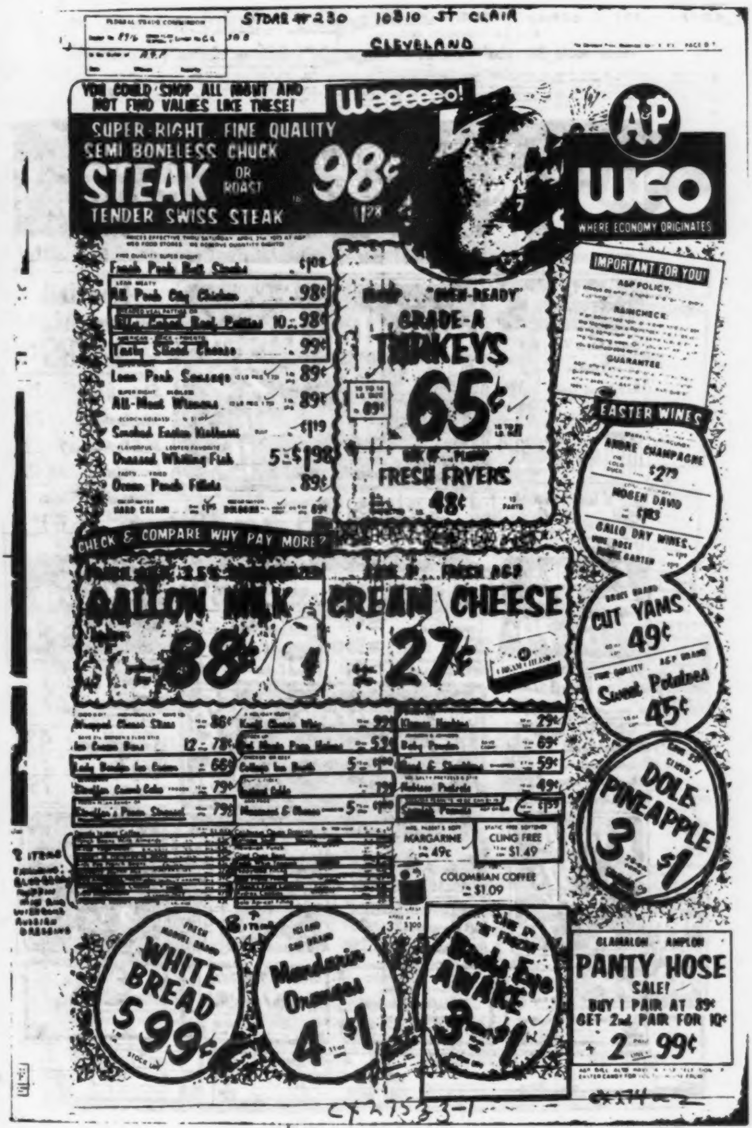
FRESH JANE PARKER

ANGEL FOOD 49¢

BROWN & SERVE

TWIN ROLLS 3 $1

CX27533 ~~Rx 274 A2~~



STORE #230 10810 ST CLAIR

CLEVELAND

YOU COULD SHOP ALL NIGHT AND NOT FIND VALUES LIKE THESE!

SUPER-RIGHT FINE QUALITY

SEMI BONELESS CHUCK

STEAK OR ROAST 98¢

TENDER SWISS STEAK $1.28

Fresh Pork Butt Steaks $1.08

All Pork City Chicken .98¢

Beef Patties 10 .98¢

Tasty Sliced Cheese .99¢

Lean Pork Sausage 89¢

All-Meat Wieners 89¢

Smoked Easter Kielbasa $1.19

Dressed Whiting Fish 5 $1.98

Ocean Perch Fillets .89¢

HARD SALAMI

BOLOGNA 69¢

"OVEN-READY"

GRADE-A

TURKEYS 65¢

FRESH FRYERS 48¢

A&P

Weeeeeo!

WEO

WHERE ECONOMY ORIGINATES

IMPORTANT FOR YOU!

A&P POLICY:

RAINCHECK

GUARANTEE

EASTER WINES

ANDRE CHAMPAGNE $2.79

MOGEN DAVID

GALLO DRY WINES

CHECK & COMPARE WHY PAY MORE?

GALLON MILK 88¢

FRESH A&P

CREAM CHEESE 27¢

CUT YAMS 49¢

A&P BRAND

Sweet Potatoes 45¢

DOLE PINEAPPLE 3 $1

Ice Cream Bars 12 78¢

MARGARINE 49¢

CLING FREE $1.49

COLOMBIAN COFFEE $1.09

8 ITEMS

8 ITEMS

WHITE BREAD 5 99¢

Mandarin Oranges 4 $1

Birds Eye AWAKE 3 $1

PANTY HOSE

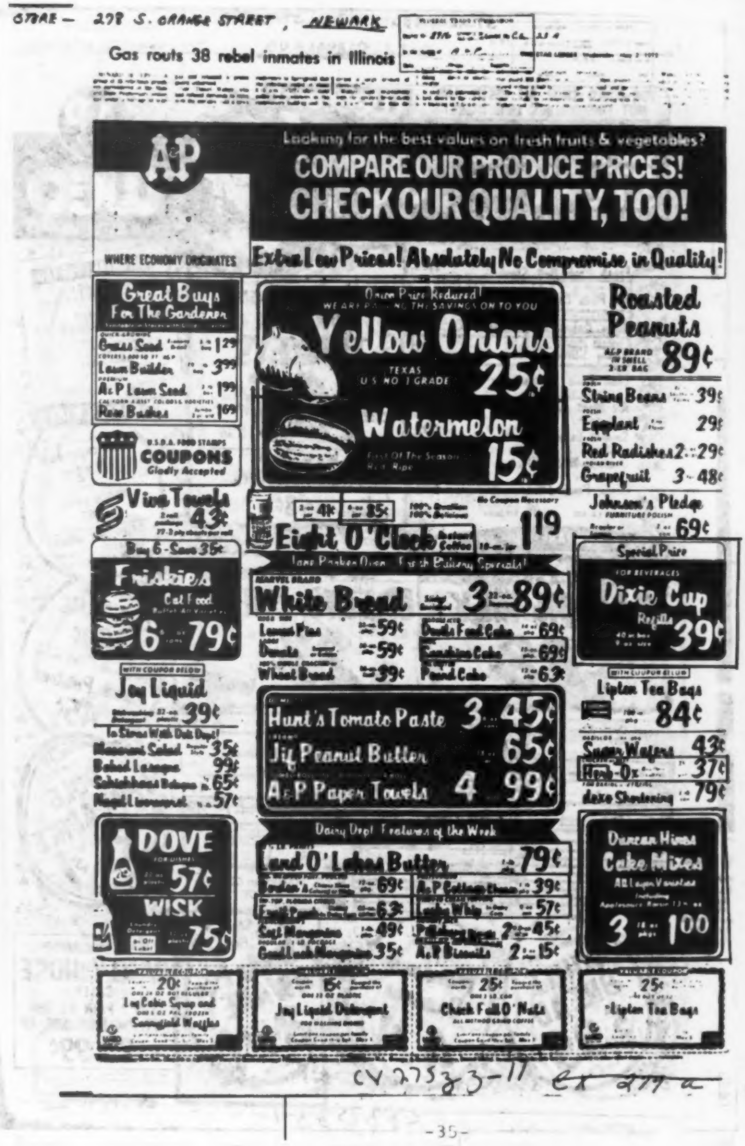
SALE!

BUY 1 PAIR AT 89¢

GET 2nd PAIR FOR 10¢

2 99¢

CX 27533-1



STORE — 278 S. ORANGE STREET, NEWARK

Gas routs 38 rebel inmates in Illinois

A&P

WHERE ECONOMY ORIGINATES

Looking for the best values on fresh fruits & vegetables?

COMPARE OUR PRODUCE PRICES!

CHECK OUR QUALITY, TOO!

Extra Low Prices! Absolutely No Compromise in Quality!

Great Buys For The Gardener

Grass Seed 1.29

Lawn Builder 3.99

A&P Lawn Seed 1.99

Rose Bushes 1.69

U.S.D.A. FOOD STAMPS COUPONS Gladly Accepted

Viva Towels 43¢

Buy 6 - Save 35¢

Friskies Cat Food 6 79¢

WITH COUPON BELOW

Joy Liquid 39¢

Onion Price Reduced! WE ARE PASSING THE SAVINGS ON TO YOU

Yellow Onions TEXAS U.S. NO. 1 GRADE 25¢ lb.

Watermelon First Of The Season 15¢ lb.

4¢ 85¢ 100% Quality 100% Delicious No Coupon Necessary

Eight O'Clock Instant Coffee 1.19

Jane Parker Oven Fresh Bakery Specials!

MARVEL BRAND White Bread 3 89¢

Lemon Pies 59¢

Donuts 59¢

Wheat Bread 39¢

Devils Food Cake 69¢

Sunshine Cake 69¢

Pound Cake 63¢

Hunt's Tomato Paste 3 45¢

Jif Peanut Butter 65¢

A&P Paper Towels 4 99¢

Roasted Peanuts A&P BRAND IN SHELL 89¢

String Beans 39¢

Eggplant 29¢

Red Radishes 2 29¢

Grapefruit 3 48¢

Johnson's Pledge FURNITURE POLISH 69¢

Special Price

FOR BEVERAGES Dixie Cup Refills 39¢

WITH COUPON BELOW

Lipton Tea Bags 84¢

In Stores With Deli Dept!

Macaroni Salad 35¢

Baked Lasagna 99¢

Schickhaus Bologna 65¢

Liverwurst 57¢

DOVE FOR DISHES 57¢

WISK 75¢

Dairy Dept. Features of the Week

Land O'Lakes Butter 79¢

Borden's 69¢

A&P Cottage Cheese 39¢

63¢

Lucky Whip 57¢

Margarine 49¢

2 45¢

Good Luck Margarine 35¢

A&P Biscuits 2 15¢

Sugar Wafers 43¢

Herb-Ox 37¢

dexo Shortening 79¢

Duncan Hines Cake Mixes All Layer Varieties 3 1.00

VALUABLE COUPON 20¢ Log Cabin Syrup and Downyflake Waffles

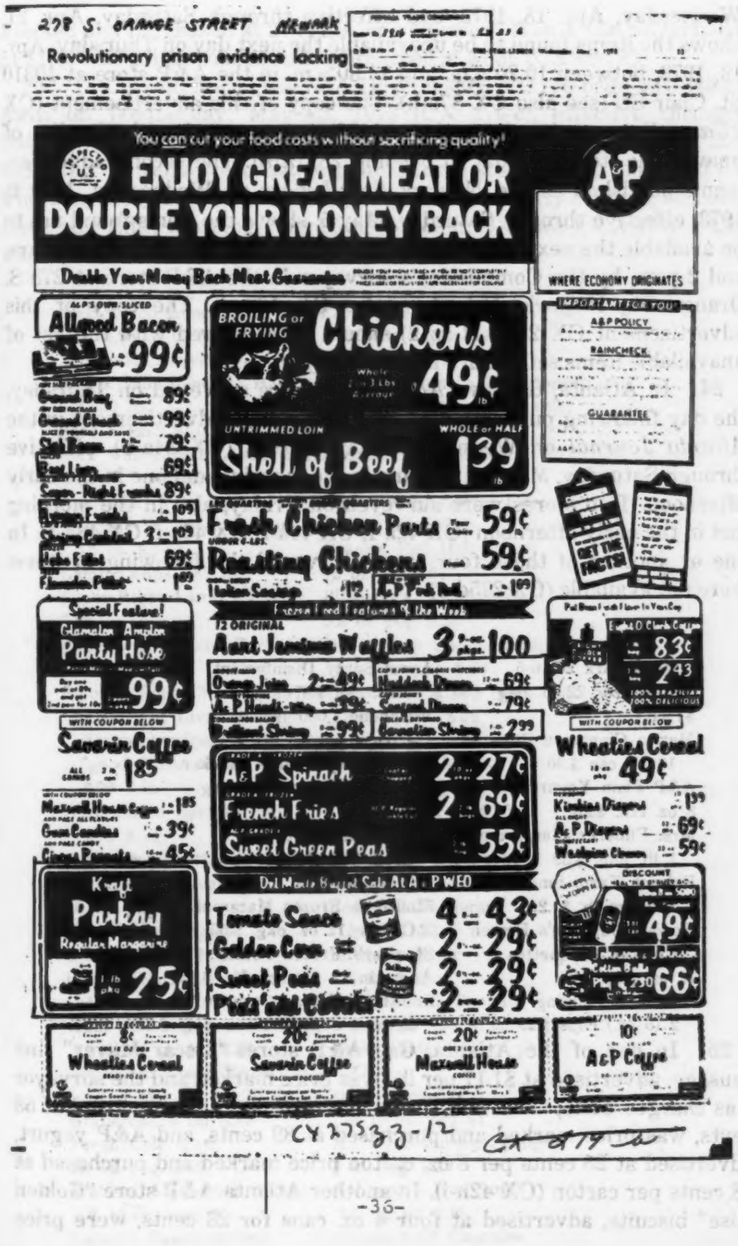
VALUABLE COUPON 15¢ Joy Liquid Detergent

VALUABLE COUPON 25¢ Chock Full O' Nuts

VALUABLE COUPON 25¢ Lipton Tea Bags

CX 275 Z 3-11 ~~ex 277 a~~

-35-



278 S. ORANGE STREET NEWARK

Revolutionary prison evidence lacking

You can cut your food costs without sacrificing quality!

ENJOY GREAT MEAT OR DOUBLE YOUR MONEY BACK

Double Your Money Back Meat Guarantee

A&P

WHERE ECONOMY ORIGINATES

A&P'S OWN-SLICED Allgood Bacon 99¢

Ground Beef 89¢

Ground Chuck 99¢

Slab Bacon 79¢

Beef Liver 69¢

Super-Right Franks 89¢

Franks 1.09

Shrimp Cocktail 3 for 1.09

Hake Fillet 69¢

Flounder Fillet 1.09

BROILING or FRYING Chickens Whole 2 to 3 Lbs Average 49¢ lb

UNTRIMMED LOIN Shell of Beef WHOLE or HALF 1.39 lb

Fresh Chicken Parts Your Choice 59¢

UNDER 6-LBS. Roasting Chickens 59¢

Italian Sausage 1.12

A&P Pork Roll 1.09

IMPORTANT FOR YOU!

A&P POLICY

RAINCHECK

GUARANTEE

GET THE FACTS!

Special Feature! Glamalon Amplon Panty Hose 99¢

Frozen Food Features of the Week

12 ORIGINAL Aunt Jemima Waffles 3 pkgs. 1.00

Orange Juice 2 for 49¢

Haddock Dinner 69¢

A&P Handi-Whip 39¢

Dinner 79¢

Shrimp 99¢

Shrimp 2.99

Eight O'Clock Coffee 83¢ 2.43

100% BRAZILIAN 100% DELICIOUS

WITH COUPON BELOW Savarin Coffee ALL GRINDS 2 lb can 1.85

WITH COUPON BELOW Maxwell House Coffee 1.85

Gum Candies 39¢

Peanuts 45¢

GRADE A FROZEN A&P Spinach 2 for 27¢

GRADE A FROZEN French Fries 2 for 69¢

A&P GRADE A Sweet Green Peas 55¢

WITH COUPON BELOW Wheaties Cereal 49¢

Kimbies Diapers 1.39

A&P Diapers 69¢

Cleaner 59¢

Kraft Parkay Regular Margarine 1 lb pkg 25¢

Del Monte Buffet Sale At A&P WEO

Tomato Sauce 4 for 43¢

Golden Corn 2 for 29¢

Sweet Peas 2 for 29¢

Peas and Carrots 2 for 29¢

DISCOUNT 49¢

Johnson & Johnson Cotton Balls Pkg of 230 66¢

Coupon worth 8¢ Wheaties Cereal

Coupon worth 20¢ Savarin Coffee VACUUM PACKED

Coupon worth 20¢ Maxwell House COFFEE

10¢ A&P Coffee

CX 27533-12

~~CX 874-a~~

-36-

Wednesday, Apr. 18, 1973, and effective through Saturday, Apr. 21, shows the items found to be unavailable the next day on Thursday, Apr. 19, 1973, between 10:20 a.m. and 11:30 a.m. in the A&P store at 10310 St. Clair St. (see also CX 87a-h). The copy of this advertisement (CX 275zz-zz1), reproduced herein, should be compared with the list of unavailable items set out in Finding 28, *infra*. The second advertisement, published in the Newark *Star-Ledger* on Wednesday, May 2, 1973, effective through Saturday, May 5, shows the items found not to be available the next day on Thursday, May 3, 1973, between 12:30 p.m. and 2 p.m., by the Commission's surveyor in the A&P store at 278 S. Orange St., Newark, N.J., (see also CX 163c-i). The copy of this advertisement CX 275zz11-zz12) should be compared with the list of unavailable items set out in Finding 30, *infra*.

24. In Atlanta, Ga., two A&P stores were surveyed on Thursday, the day following publication of A&P's two-page advertisement in the *Atlanta Journal* on Wednesday, May 2, 1973 (CX 34a-b), effective through Saturday, May 5, 1973, one in the morning and one in the early afternoon. Two stores were surveyed on Friday, also in the morning and in the early afternoon (CX 42a-f; CX 44a-f; CX 46a-f; CX 48a-f). In one or another of these four stores surveyed the following 14 items were not available (CX 275d-e):

Oxford Park 20-10-5 Fertilizer 22 lb. bag $1.99
Merico Cinnamon Buns 10 oz. can $.30
A&P Plain Yogurt 8 oz. ctn. $.25
Mrs. Filbert's Margarine 1 lb. pkg. $.39
Eckrich Farm Smoked Sausage lb. $1.29
Howard Johnson's Frozen Chicken Croquettes 12 oz. pkg. $.73
Chocolate Pudding 2 (5 oz.) cups $.29
Lysol Spray Disinfectant 7 oz. can $.87
Wishbone 1,000 Island Dressing 8 oz. btl. $.41
Kraft Sharp Wedge Cracker Barrel Cheese 8 oz. pkg. $.75
Minute Maid Frozen Grapefruit Juice 6 oz. can $.29
Stouffer's Frozen Macaroni & Cheese 12 oz. pkg. $.55
Stouffer's Frozen Potato Augratin 11 1/2 oz. pkg. $.55
Stouffer's Frozen Corn or Spinach Souffle 12 oz. pkg. $.55

25. In one of the Atlanta, Ga., A&P stores "Oscar Mayer" link sausage, advertised at $1.17 per lb., was price marked and the surveyor was charged $1.45, "Maxwell House" coffee 1 lb. can, advertised at 58 cents, was price marked and purchased at 89 cents, and A&P yogurt, advertised at 25 cents per 8 oz. carton price marked and purchased at 28 cents per carton (CX 42h-i). In another Atlanta A&P store "Golden Rise" biscuits, advertised at four 4 oz. cans for 23 cents, were price

marked and purchased at 27 cents, and "Beacon" Mop & Glo, advertised at $1.29 was priced marked and purchased at $1.35 (CX 48c, e).

26. In Detroit, Mich., where A&P published a three-page advertisement on Wednesday, May 23, 1973 (CX 27a-c), effective through Saturday, May 26, in one or another of the four stores surveyed the following 53 items were not available, three stores being surveyed on Thursday, May 24, in the morning, afternoon and early evening, and one store on Friday morning, May 25 (CX 275s-u; CX 105a-l; CX 107a-l; CX 109a-l; CX 111a-l):

A&P Sliced Lunch Meat lb. $.98 (3 of 6 varieties unavail.)
Riegal Semi-Boneless Ham $1.29 lb.
Pork Steaks $1.09 lb.
A&P Thin-Sliced Lunch Meat (5 of 7 varieties unavail.) 3 oz. $.43
Hygrade Sandwich Spread 12 oz. $.75
Lamb Chops $.89 lb.
Super-Right Lamb Patties $.89
Super-Right Sliced Pork Liver $.69 lb.
Smoked Pork Chops $1.39 lb.
Super-Right Liver Sausage Braunschweiger $.59 8 oz.
Allgood Sliced Bacon $.99 1 lb.
A&P Sliced Beef Bologna $.69 8 oz.
A&P Pretzels (2 out of 3 varieties unavail.) 10 oz. pkg. $.35
Cool Whip Swiggle 6 1/4 oz. pkg. $.55
Shedd's Safflower Margarine 1 lb. ctn. $.39
Aunt Jane's Sweet Sandwich Pickles qt. jar $.39
Pepsodent Tooth Brush adult size hard $.39
Grapefruit 6 for $.79
Fresh Cole Slaw 12 oz. pkg. $.29
Waldorf A&P fresh Salads 3 13-oz. cups $1
Lawry's Seasoned Salt
Fresh Dressed Smelt $.49 lb.
Northern Paper Towels 3 roll pkg. $1
Funk & Wagnalls Encyclopedia (7 out of 23 vols. unavail.) $1.99 each
Doumak Marshmallows 1 lb. pkg. 4 for $1
A&P Frozen Coffee Creamer (pt ctn.) $.17
Frank's Red Hot Sauce 12 oz. jar $.57
Pillsbury's Donut Puffs 9.5 oz pkg. $.33
Dole Fancy Sliced Pineapple 14 1/2 oz. can $.29
Comstock's Mixed Bean Salad 1 lb. $.39
Lawry's Seasoned Salt 8 1/2 oz. $.57
Balsam Every Night Shampoo 8 oz. $.95
Q.T. Lotion 2 oz. tube $1.39
Body All Deodorant 5 oz. $1.23
Pillsbury Flour 5 lb. $.65
A&P Spanish Peanuts 2 1/2 lb. can $1.59
Paper Plates 100 ct. pkg. $.59
Dailey Relishes 4 10-oz. jars $1
Marvel Celluloise Sponges 4 in pkg. $.29
Gebhardt's Hot Sauce 6 oz. jar $.19
Contac Cold Capsules

16 oz. $.87
Nu-Maid Soft Margarine
1 lb. bowl $.50
Renuzit Air Freshener
7 oz. size $.67
Minute Rice
(1 lb. 12 oz.) 85
Orange Marmalade
(14 oz.) $.49
Elec. Perc. Chase &
Sanborn 1 lb. can $.98
Libby Lemonade 12 oz. can
$.23

10 ct. pkg. $.96
Ant & Roach Killer
14 oz. $.99
Crisco Oil (1 qt. 16 oz.)
$1.09
Robin Hood Flour
25 lb. bag $2.59
Soft & Dri Anti-Perspirant
5 oz. twin pack $.89
White Rain Shampoo
14 oz. $.79
Coppertone Lotion
4 oz. $1.59

27. In one store "Erkrich" smoked sausage, advertised at $1.35 lb., was price marked and the surveyor was charged $1.55, "Tiger Town" boiled ham, advertised at $1.59 for 12 oz., was price marked and the surveyor was charged $1.79, "Charmin" bathroom tissue, four rolls being advertised for 37 cents, was price marked and the surveyor was charged 43 cents, "Ann Page" cole-slaw dressing, advertised 3 jars (8 oz.) for $1, were price marked and the surveyor was charged 39 cents a jar, "Ann Page" Russian dressing, advertised 3 jars (8 oz.) for $1, was price marked and the surveyor was charged 37 cents per jar, "Dole" pineapple, advertised at 37 cents for a 1 lb. 4 oz. can, was price marked and the surveyor was charged 38 cents per can, "Soft & Dri" anti-perspirant, 5 oz. twin pack, advertised for 89 cents, was price marked and the surveyor was charged $1.78 (CX 105n). In another store "Charmin" bathroom tissue, advertised, as stated, four rolls for 37 cents, was price marked and the surveyor was charged 43 cents, "Oreo" cookies, advertised at 49 cents for a 1 lb. 3 oz. pkg., were price marked and the surveyor was charged 66 cents, "Campbell's" pork and beans, advertised at 15 cents for a 1 lb. can, was price marked and the surveyor was charged 19 cents, "Ann Page" cole-slaw dressing, advertised, as stated, at 3 jars (8 oz.) for $1, was price marked and the surveyor was charged 39 cents a jar, "Nu-Maid" soft margarine, advertised at 50 cents a lb., was price marked and the surveyor was charged 51 cents (CX 107n). In the third store "Doumak" regular marshmallows, advertised 4 pkgs. (1 lb.) for $1, were price marked and the surveyor was charged 28 cents per pkg., "Aunt Jane's" Kosher Dill pickles, advertised at 49 cents per qt., were price marked and the surveyor was charged 59 cents, a "Pepsodent" toothbrush, advertised at 39 cents, was price marked and the surveyor was charged 59 cents, "Ann Page" cole-slaw dressing, advertised, as stated, 3 jars (8 oz.) for $1, was price marked and the surveyor was charged 39 cents a jar, "Ann Page" Russian dressing, advertised 3 jars (8 oz.) for $1, was price marked and the surveyor was charged 37 cents per jar, "Dole"

pineapple, advertised at 37 cents for a 1 lb. 4 oz. can, was price marked and the surveyor was charged 38 cents, "Robin Hood" flour, advertised at 65 cents for a 5 lb. sack, was price marked and the surveyor was charged $1.09, "Soft & Dri" anti-perspirant, advertised at 89 cents per 5 oz. twin pack, was price marked and the surveyor was charged $1.78, and "Nestea" instant tea, advertised at $1.35 for a 3 oz. container, was price marked and the surveyor was charged $1.39 (CX 109n). In the fourth store surveyed, "Charmin" bathroom tissue, advertised at 37 cents for four rolls, was price marked and the surveyor was charged 43 cents, "Ann Page" cole-slaw dressing, advertised at 3 jars (8 oz.) for $1, was price marked and the surveyor was charged 39 cents each, "Ann Page" Russian dressing, advertised at 3 jars (8 oz.) for $1, was price marked and the surveyor was charged 37 cents each, "Dole" pineapple, advertised at 37 cents for a 1 lb. 4 oz. can, was price marked and the surveyor was charged 38 cents, "Skippy" creamy peanut butter, advertised at 58 cents for a 1 lb. 2 oz. jar, was price marked and the surveyor was charged 68 cents (CX 111n).

28. In Cleveland, Ohio, following the publication of A&P's two page advertisement in the *Cleveland Press* (CX 38a-b) on Wednesday afternoon, Apr. 18, 1973, effective through Saturday, Apr. 21, the A&P store at 10310 St. Clair Street, was surveyed the next day beginning at 10:20 a.m. (CX 87a-h). The following items were not available in this store (CX 87a-h):

Hot Cross Buns pkg. $.55
Wishbone French Dressing 3 (8 oz.) btls $1
K-Brand Pickles 20 oz. jar $.59
Tasty Sliced Cheese 3 kinds lb. $.99
Stouffer's Pecan Streusel 10 oz. pkg. $.79
Easter Flowers and Plants (5 of 7 varieties unavail.)
Horseradish Root lb. $.59
Red Beets bu. $.29
Libby's Beets 3 (16 oz.) cans $1
Hanover 3 Bean Salad 17 oz. jar $.53
All Pork City Chicken lb. $.98
Jiffy Cubed Beef Patties or Breaded Veal Patties 10-ct pkg. $.98
Lady Borden Ice Cream
Kleenex Napkins 50-ct. $.29
A&P Spanish Peanuts 40 oz. can $1.59
Virginia Peanuts 40 oz. can $1.79
Cling Free Softener 13 oz. can $1.49
Birds Eye French Beans w/almonds 9 oz. $.45
Birds Eye French Beans w/mushrooms 9 oz. 45
Kraft Whipped Cream Cheese 8 oz. $.59
Kraft Mayonnaise 16 oz. $.47
Kellogg Stuff, Chicken or Meat 5 oz. box $.49
Solo Poppyseed Filling 12 oz. $.45
Solo Lemon Filling 12 oz. $.43
Dole Pineapple (2 of 3 varieties unavail.) 3 (20 oz.) cans $1

qt. ctn. $.66
Del Monte Pear Halves
30 oz. can $.53
Eight O'Clock Instant
Coffee 6 oz. jar $.79
Reddi Whip Topping
7 oz. $.65
Hydrox Cookies Sunshine
14 oz. $.54

Birds Eye Mixed Vegetables
w/onion sauce
8 oz. pkg. $.45
Birds Eye Broccoli in
Hollandaise sauce
10 oz. pkg. $.45
Solo Apricot Filling
12 oz. can $.49
Birds Eye Awake
3 (12 oz.) cans $1

29. In the same store Pork Roast featured in the advertisement at 98 cents a lb., was price marked and the Commission surveyor was charged $1.15 a lb., dressed Whiting featured at $1.98 for a 5 lb. box was price marked and the surveyor was charged $2.39, "Freshlike" green beans and sweet peas advertised 4 (14 oz.) cans for a $1, were price marked and the surveyor was charged 29 cents and 26 cents per can respectively, "Ched-O-Bit" wrapped cheese slices, advertised at 86 cents (16 oz.) pkg., were price marked and the surveyor was charged 99 cents, "Mrs. Filbert's" soft margarine, advertised at 49 cents 1-lb. pkg., was price marked and the surveyor was charged 53 cents, "Borden" ice cream bars advertised at 78 cents for a carton of 12, were price marked and the surveyor was charged 99 cents, "Birds Eye Awake", advertised at 3 for $1 (12 oz. size), were price marked and the surveyor was charged 39 cents each, "Kraft" Thousand Island dressing advertised at 59 cents for a 16 oz. jar, was price marked and the surveyor was charged 69 cents, "Johnson & Johnson" baby powder advertised at 69 cents for a 14 oz. container, was price marked and the surveyor was charged 99 cents, and "Gallo" Rose Wine advertised at $1.19 for a fifth of a gallon, was price marked and the surveyor was charged $1.25 (CX 87j).

30. In Newark, N.J., following publication of A&P's advertisement on Wednesday afternoon, May 2, 1974, in the *Star-Ledger* (CX 23a-b), the A&P store at 278 S. Orange Street was surveyed beginning at 12:30 p.m. the next day (CX 163c-i). The following advertised items were unavailable (CX 163c-i):

Watermelon $.15 lb.
Eight O'Clock Instant
Coffee 2 oz. jar $.41
White Bread 3 (22 oz.
loaves) $.89
Sunshine Cake
15 oz. pkg. $.69
Dixie Cup Refills (40 in
box) 9 oz. size $.39
Herb-Ox Bouillon Cubes
25 in cont. $.37

Land O'Lakes Butter
1 lb. pkg. $.79
Tip-Top Fruit Punch
64 oz. ctn. $.63
A&P Cottage Cheese
1 lb. pkg. $.39
Lucky Whip 9 oz. can $.57
Minute Maid Orange Juice
2 (6oz.) cans $.49
Brilliant Shrimp (cooked)
8 oz. pkg. $.99

Duncan Hines Cake Mixes
3 (18 oz. pkgs.) $1
Sliced Beef Liver $.69 lb.
All Meat Armour Franks
1 lb. pkg. $1.09
Frozen Hake Fillet $.69 lb.
Kraft Parkay Regular
Margarine 1 lb. pkg. $.25

Cap'n John's Haddock Dinner
12 oz. pkg. $.69
A&P Pork Roll (mild or fancy)
1 1/2 lb. roll $1.69
Carnation Shrimp (peeled & deveined) 1 lb. pkg. $2.99

No overpriced items were found at this store (CX 163a-i).

31. The record in this proceeding contains extensive additional evidence of unavailability and overpricing of advertised items, similar to the foregoing, in A&P stores in Baltimore, Birmingham, Alabama, Buffalo, Chicago, Indianapolis, Kansas City, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Rochester, Toledo, and Washington, D.C. See: Baltimore, CX 275f-g, CX 51a-j, CX 55a-g, CX 56h-j, CX 57a-j; Birmingham, CX 275h-i, CX 60a-g, CX 62a-g, CX 64a-g, CX 66a-g; Buffalo, CX 275j-k, CX 69a-g, CX 71a-g, CX 73a-g, CX 75a-g; Chicago, CX 275 l-n, CX 80a-g, CX 82a-g, CX 84a-g; Indianapolis, CX 275x-y, CX 123a-e, CX 125a-e, CX 127a-e, CX 129a-e; Kansas City, CX 275z-aa, CX 132a-m, CX 134a-m, CX 136a-m, CX 138a-m; Louisville, CX 275bb-cc, CX 141a-f, CX 141h, CX 143a-g, CX 143h, CX 145a-f, CX 145h, CX 147a-f, CX 147h; Milwaukee, CX 275dd-ff, CX 150a-i, CX 152a-h, CX 154a-i, CX 156a-i; Newark, CX 275gg-hh, CX 159c-i, CX 161c-h, CX 163c-i, CX 165c-i, CX 165k; New Orleans, CX 275ii, CX 275zz15, CX 168c-e, CX 170c-e, CX 172c-e, CX 174c-e; New York, CX 275jj-ll, CX 275zz16-zz18, CX 177a-f, CX 179a-f, CX 181a-f, CX 183a-e, CX 183i; Philadelphia, CX 275oo-pp, CX 275zz19-zz20, CX 186a-k, CX 188a-k, CX 190a-k, CX 192a-k; Rochester, CX 275qq, CX 204a-e, CX 206a-e, CX 208a-e, CX 210a-e; Toledo, CX 275rr-ss, CX 213a-h, CX 213j, CX 215a-h, CX 215j-k, CX 217a-h, CX 217j, CX 219a-h, CX 219j; and Washington, D.C., CX 275v-w, CX 275zz9-zz10, CX 116a-l, CX 116n, CX 118a-l, CX 118n, CX 120a-l, CX 120n.

32. As the foregoing findings disclose, unavailable and overpriced items were of all types. Although some of the unavailable and overpriced items were not basic food products or essential household articles, many were in those categories. Items given prominence in A&P's advertisements were unavailable and overpriced, as well as items given only one line in the advertisements. In 16 of the A&P stores surveyed, three or more of the items most prominently featured in the advertisements were unavailable (RX 1130).

33. Substantial and significant unavailability and overpricing were found in the "within city" A&P stores, as well as in A&P stores in the suburban areas, in large stores as well as small, in both relatively affluent and nonaffluent neighborhoods, and in most cities surveyed,

regardless of size or geographic location (see CX 222a-c; CX 264c-f; Tr. 1432; Eliasen, Tr. 523; Hare, Tr. 693; Van Lentin, Tr. 2253; Okoniewski, Tr. 613). As complaint counsel note, had the items found to be unavailable or overpriced in one or another of the A&P stores in each city surveyed been removed from the A&P advertisements published in those cities, such advertisements in many instances would have been quite different from what they were.

Unavailability and Overpricing Found in A&P Stores Exceeded Any Irreducible Minimum Due to Human Error or Other Factors Beyond the Control of A&P

34. In an organization as large and complex as A&P's, as well as in the operation even of a single, modern supermarket, some occasional unavailability and overpricing of advertised items are probably inevitable due to human error beyond the ability of the organization, however efficient, to wholly eliminate, or due to outside, uncontrollable factors such as transportation delays, strikes, weather, actions of third party suppliers, and the like. The substantial and widespread unavailability disclosed by the Commission's 1973 survey to exist in A&P stores, and reviewed to some extent in prior Findings, however, was not due to human error beyond the power of A&P to eliminate, and was not the result of circumstances beyond A&P control such as nondelivery to A&P of items previously ordered in quantities sufficient to meet reasonably anticipated demands, extraordinary purchases of advertised items by the public which could not have been reasonably anticipated, storms, weather, or the like. Although there were instances of unavailability attributable to such factors, the great bulk of unavailability did not result from such causes. Unavailability of advertised items, on the contrary, resulted from A&P's own practices and procedures.

35. The fact must not be lost sight of that A&P's management in the metropolitan areas surveyed prepared the advertisements published in the newspapers serving such areas, and selected the items to be included and the prices to be published. Having determined to advertise particular products, it was the responsibility of A&P's management to see to it that the items were available in the A&P stores covered by advertisements during the effective periods at the prices featured, unless the advertisements included a proper notice of stores not having a particular item, or unless factors beyond A&P's control prevented availability or correct price marking. As a generality, it would seem beyond argument that a product advertised at a price in a marketing area must be available to the public in the stores of the advertiser in the area covered by the advertisement, at the price

advertised, in the absence of a lawful disclaimer, or factors truly beyond the control of the advertiser.

36. What is involved in this proceeding is not the unavailability of an isolated advertised item, or even of a few items, or unavailability of items, for example, on Saturday evening near the end of the effective period of an advertisement, or even unavailability in a few stores out of many. Instead, the evidence discloses substantial and widespread unavailability of relatively large numbers of advertised products, in many stores of A&P, during what the undersigned would conclude to be prime shopping periods on days immediately following the publication of full page advertising in major metropolitan dailies. And, as already indicated, the unavailable products consisted of all kinds of items including meat, fish, canned goods, frozen food, fruit, produce, dairy products, bakery items, household supplies, and miscellaneous items. Unavailability ranged from items which might be regarded as luxuries (orchid corsages (CX 275q)), to staples (ordinary white bread (CX 275zzll)). Similarly, all types of products were marked with prices higher than those advertised.

37. A&P officials who testified in this proceeding did not ascribe the unavailability and overpricing found overall in the Commission's 1973 survey to factors beyond the control of A&P. Unavailability and overpricing were generally attributed to internal decisions, procedures or mistakes. Managers or representatives from 41 out of the 80 A&P stores surveyed told the Commission's monitors that one or more items were unavailable because they were not regularly carried (CX 225a-f). The former sales director of the Cleveland Division testified that the principal cause of unavailability of advertised items was store manager error, either failure to order the item or failure to order in adequate quantities (Weschler, Tr. 462-63, 422, 437-38). The A&P vice president and general manager of the Bronx Division testified, based on inquiry in 1974, that errors by the individual A&P store manager were the principal causes of unavailability (Van Lentin, Tr. 2259-2260):

> [the manager] either does not order or he fails to order enough, this is the kind of thing, or he doesn't follow up on his people or something like that.

The general superintendent of A&P's Birmingham Division also testified that practices of A&P store managers were the major cause of unavailability of advertised items (Browning, Tr. 1058):

> Not following all the procedures that are sent out, not following the sales program exactly to order the merchandise, and occasionally not ordering enough, not seeing the potential in the sale.

38. A&P management did not effectively detect and eliminate unavailability in individual food stores. The testimony of the former A&P sales director of the Detroit Division, where substantial unavailability and overpricing were uncovered by the 1973 Commission

survey, reveals that internal A&P procedures for preventing unavailability of advertised items in A&P stores were not fully enforced (MacDonald, Tr. 828-837). This official testified that the amount of unavailability and overpricing of advertised items in the Detroit Division was "totally unsatisfactory" (Tr. 856). Two of the "within city" A&P stores in Detroit often did not order items advertised by the Division (Hare, Tr. 703-08, 715-16). The manager of one A&P store surveyed in Detroit testified that he did not stock all advertised items believing that he had discretion in this area (Eliasen, Tr. 537). The Commission's survey revealed that 30 advertised items in this store were unavailable and 22 advertised items were overpriced (CX 222a), and the store was not adequately checked for unavailability and overpricing by A&P supervisory personnel in the Detroit Division (Hare, Tr. 548-49). Another Detroit store manager testified as to the official company policy of A&P to have all advertised items available (Okoniewski, Tr. 636):

> It was company policy and requirement of having the merchandise on hand but I never took it very seriously.

Mr. Okoniewski's store was not carefully checked by the A&P supervisor in charge to determine the availability of advertised items (Tr. 640). The Commission's survey found 35 advertised items to be unavailable and 13 items overpriced (CX 222a; see also Okoniewski, Tr. 639).

39. A&P's divisions did not restrict advertised items to those which were stocked by all the A&P stores in the area covered by the advertisements published (MacDonald, Tr. 788-791; Browning, Tr. 1011). Thus, the advertisement surveyed in the Detroit area contained 28-32 items that were not part of the regular inventory of the A&P stores covered by the advertisement (MacDonald, Tr. 805), and in the Cleveland area there were 35 items advertised not regularly stocked in all the stores covered by that advertisement (CX 225c). In the eight stores surveyed in Cleveland and Detroit, three listed 12, 17, and 35 items as unavailable because they were not stocked (CX 225c). Indeed, the A&P divisions handling advertising for the A&P stores in their areas did not even know whether or not every A&P store to be covered by a proposed advertisement actually carried all the products to be included in the advertisement (Cairns, Tr. 1148-49; Gilbert, Tr. 2285; Niezgoda, Tr. 1946-1950; Burtis, Tr. 1861-62; Browning, Tr. 1005-08). Where items were not stocked by A&P stores, they obviously had to be specially ordered by the nonstocking store to be available when advertised. As a management technique, however, A&P in general did not follow a policy of shipping products to a store manager unless they were specifically ordered. A&P may have had sound business reasons

for this practice, but it may have been related to unavailability. It was A&P policy to vest responsibility for successful operation of its retail food stores in the store manager. Company policy also emphasized inventory control, and discouraged the accumulation of excessive inventory of products. A&P's National Purchasing Department established "inventory ceilings" for each division to avoid the inefficiencies and costs of tying up capital in unnecessary inventory (MacDonald, Tr. 911; Allen, Tr. 1170-71). A&P management regarded it as inconsistent to hold a store manager responsible for the successful operation of the store committed to his charge, including the control of its inventory, yet to ship him products not ordered (Weschler, Tr. 428). For this reason, as earlier stated, it was not A&P's practice for the warehouse to ship products to stores, which were not specifically ordered (Cairns, Tr. 1280-81). The sales director of the Cleveland Division testified (Weschler, Tr. 427-28):

> * * * when a store places an order that is exactly what he will get. Even if we know that he didn't order something that we are going to advertise, we don't have the liberty of adding a case to his order. He is the only one who can requisition it from the warehouse.

Individual store managers, however, as already described, did not always order advertised items for various reasons. On this point a former Cleveland Division sales director testified (Weschler, Tr. 422):

> Q. From your experience with A&P have you frequently found that a manager's judgment of what he thinks he is going to sell is wrong, an underestimate of what he thinks he is going to sell?
>
> A. It is, but only because of the pressures that have been put upon him.
>
> Q. What pressures are those?
>
> A. That is because from the Vice President and the Treasurer on down he is continually being pressured to keep his inventory under control. He will get more censure for a high inventory than almost anything he can do, and knowing this, unfortunately he is going to be conservative in this judgment instead of generous.

The policy of not shipping products being advertised from A&P's warehouses to individual A&P stores covered by the advertisements appears to have contributed to the unavailability found, and was a policy within the control of A&P.

40. The practice by which local A&P management advertised items regardless of, or without knowing, whether they were carried in all the A&P stores covered by the advertisements affected stores with limited shelf space and was related to unavailability. Where a store did not regularly stock an advertised item, and also had limited shelf space, the item not only had to be specially ordered but space had to be provided for displaying it (Cairns, Tr. 1164). Arrangements for the display of items advertised by the area A&P management, but not stocked in a particular store, required the time and effort of store clerks (Dr. Holdren, Tr. 1496-97, 1420-21; Cairns, Tr. 1207-09), and this factor, combined with A&P's inventory control, affected the ordering of

advertised items not regularly carried. Advertising items not stocked in all the A&P stores within the coverage of the advertisement appears to have accounted for substantial unavailability, and was a factor within the control of A&P management (CX 225a).

41. Likewise, failure of individual A&P store managers to order, and to have in stock, sufficient amounts of advertised items was a factor within the control of A&P. Store managers attributed a substantial degree of unavailability of advertised items to being "sold out" (CX 225a). Yet, the Commission's survey was conducted on Thursday, the day following the mid-week advertisement, and on Friday, during prime shopping hours, except for only four of the 80 stores. There is nothing to suggest that the overall unavailability found was due to exceptional purchases by the public which could not have been anticipated by A&P. There were individual stores in Detroit, New Orleans and Pittsburg which store managers asserted were "sold out" of certain advertised items on Thursday morning following the Wednesday evening advertisement, which was advertised as effective through Saturday (CX 222a-c; CX 225a-f).

42. It was A&P's "official" company policy that all advertised items must be available in all A&P stores covered by advertisements at the prices advertised (RX A-12, RX A-15, RX A-17, RX B-25). This policy, however, was not "policed" to make sure that it was actually carried out, and that every individual store consistently had available all the items advertised in its area. The sales director of the Birmingham Division testified that, although checks of availability of advertised items were required to be made by each supervisor in charge of a number of individual A&P stores, the checks were not regularly carried out (Browning, Tr. 1049). The vice president and general manager of the Toledo Division likewise indicated that the checks of individual stores for advertised item availability were not effectively conducted and monitored (MacDonald, Tr. 828-29, 835-38). His testimony was as follows (Tr. 837):

> Q. * * * Did your system of checks indicate to you that your smaller stores were in fact abiding by the official policy? Did your system of checks indicate to you and assure you that your smaller stores were in compliance?
>
> A. I don't recall seeing the checks on small stores as to number of items unavailable.
>
> Q. So the answer is no, your system did not assure you that your smaller stores were in compliance?
>
> A. Right.
>
> Q. Did your system assure you that your middle-size stores were in compliance?
>
> A. I can not say that it did.

The testimony of the vice president and general manager of the Bronx Division was similar, indicating clearly that prior to the 1973 Commission survey there was relatively inadequate monitoring of individual A&P stores for availability of advertised items (Van Lentin, Tr. 2257-58). To a degree, A&P top management seems simply to have taken for granted that the Company's declared policy of having every advertised item available in every individual A&P store was being followed. The vice president and national sales director testified (Cairns, Tr. 1238):

> We asked them for compliance. If they could not comply, if there was any problem they would be required to come back to us and tell us what the problem was. Otherwise, we would assume they had complied.

Yet, it seems to have been general knowledge within the A&P organization that many individual A&P stores were not making all the items advertised in their areas available to the public (Hare, Tr. 707-08; see also Eliasen, Tr. 187-191, and Wyatt, Tr. 954). As early as 1971 a study of A&P prepared by a leading trade publication, *Progressive Grocer*, which was distributed throughout the A&P organization, reported that a "grievance" most often complained about by A&P's customers was the unavailability of advertised products (CX 255c; CX 258a-d).

43. Evidence that the degree of unavailability and overpricing in A&P stores is not due to factors beyond its control, and far exceeds the irreducible minimum beyond the power of A&P to eliminate, may be found in the great variations in performance among A&P stores. The distribution of advertised but unavailable items among the 80 A&P stores surveyed has been set out (see Finding 21, *supra*). From this it may be seen that 11 A&P stores had 25 or more unavailable items, 18 A&P stores had between 15 and 24 unavailable items, 11 had between 10 and 14, and 19 A&P stores had four or fewer (CX 222a-c). The record does not disclose anything unique or exceptional with respect to the 19 A&P stores with few unavailable advertised items. The low level of unavailability in some A&P stores indicates that the much higher rate prevailing in most of the 80 stores surveyed was far beyond any irreducible minimum caused by human error impossible to eliminate, and was not due to factors beyond A&P's control. Furthermore, the low level of unavailability in some A&P stores indicates that significantly higher operating costs are not required to lower substantially the unavailability rate found in A&P stores generally, or in the more poorly performing segment of A&P stores.

44. Similarly a comparison of the 80 A&P stores surveyed with respect to overpricing (also set out earlier in Finding 21) reveals great variability among them, indicating that the incidence of overpricing found in a large number of A&P stores was also above any irreducible minimum caused by human error impossible to eliminate, and was not due to factors beyond A&P's control. The low levels of overpricing in some A&P stores likewise indicate that significantly higher operating costs would not be required to lower substantially the degree of

overpricing found in the 1973 Commission survey. About 10 percent of the 80 stores of A&P surveyed had no overpricing of advertised items and a little over 10 percent had only one advertised item overpriced (CX 222a-c). Thus 20 percent of A&P's stores were generally free of this problem. In contrast, 13 stores surveyed had 10 or more advertised items overpriced, and almost half of the A&P stores surveyed had more than five advertised items overpriced. The record provides no evidence that the A&P stores with substantial overpricing could not achieve the low incidence of overpricing of other A&P stores without incurring significant additional costs.

45. A&P's own internal standards for auditing its stores to find and eliminate ordinary price marking errors suggest that the degree of overpricing found in the 1973 Commission survey was neither inevitable nor acceptable. A&P systematically audits its stores to make sure items are priced correctly. In conducting such audits, A&P considers 0-20 errors out of 6,000 to 10,000 items "good," 20-40 mispriced items "fair," and anything over 40 pricing errors "poor" (Cairns, Tr. 1244). In other words, in relation to the number of items stocked, 6,000 to 10,000, A&P rates one of its stores "poor" if pricing errors reach as much as .67 percent. If this standard were applied to advertised items, a large proportion of the A&P stores surveyed would be in the "poor" category. A newspaper advertisement often may contain 120 or more items. A&P's internal standard for pricing of its overall inventory would rate as "poor" anything over one or two instances of overpricing of advertised items. Although A&P's auditing system is designed for the purpose of assuring correct pricing in stores of its overall inventory, the considerations applicable to price marking items on the shelves generally, and to price marking of items advertised would not seem significantly different. When a product is put on a shelf it must be price marked, and when an item is advertised at a lower than regular price, those on the shelves must be remarked with the lower price advertised. In either instance the procedure is essentially the same. This view is consistent with the testimony of A&P's national sales director who believed that the simple procedure of having a store clerk check the prices on advertised items before the sale period began should "nearly" eliminate overpricing (Cairns, Tr. 1180). The A&P store managers who testified in this proceeding, and whose stores had a significant number of items priced higher than the advertised prices for such items, testified that price checks had not been made in their stores to make sure that all advertised items were correctly marked with the prices advertised (Loebsack, Tr. 185; Koss, Tr. 330; Eliasen, Tr. 547; Okoniewski, Tr. 637). Checking advertised items to make certain that the item on the shelf does not bear a price

higher than that advertised is a procedure within the control of A&P. Dr. Holdren, Professor of Economics, Iowa State University, who has had some practical experience in the retail food industry, testified that in his expert opinion unavailability and overpricing could be reduced to one percent for each if procedures "to effect maximum compliance with the rule" were adopted (Dr. Holdren, Tr. 1492-94).

46. Comparison of the unavailability of all supermarket chains surveyed provides evidence that the levels of unavailability and overpricing found in the A&P stores are far above any irreducible minimum due to human error which cannot be eliminated, or cannot be eliminated without substantially increasing costs, and are not the result of factors beyond the control of A&P. Although A&P was not the worst from the standpoint of unavailability of advertised items, a heavy preponderance of chains had lower levels, and some far lower (Table III, attached). In all, 74 chains were surveyed and A&P's percentage of unavailable advertised products was greater than that found in the stores of 66 of them. A&P had greater unavailability than Safeway, Kroger, Acme, Lucky, Jewel, Winn-Dixie, Food Fair, Grand Union, and National Tea Stores. A&P's percentage of overpriced advertised items was much closer to that of its competitors, but still exceeded many. Combined percentages of unavailability and overpricing of A&P was greater than that of 51 of its chainstore competitors. Such a comparison does not imply that other retail food chains necessarily had levels of unavailability of overpricing which approached an irreducible minimum. The contrary is probably the case since A&P has asserted that unavailability and overpricing of advertised items is an industrywide problem (see A&P's motion for a stay of this proceeding pending Commission action on A&P's request for reexamination of the Trade Regulation Rule, dated Jan. 15, 1974, p. 5). Nor does a comparison imply that the operating conditions of all leading chains were identical. Nevertheless, A&P's operations do not appear to be unique as to invalidate any comparison whatever of its levels of unavailability or overpricing with those of its competitors, particularly in view of the large number of metropolitan areas surveyed and the random method by which stores to be surveyed were selected. Furthermore, if A&P has different operating conditions, such as a greater number of stores in central city locations which are smaller in size than suburban stores, and which may also have a greater proportion of "ethnic" or minority clientele, that circumstance does not justify or warrant the advertising of products and failing to have them in A&P's retail food stores at the prices quoted. A&P had an obligation to tailor its advertising to fit its operating conditions.

Advertising Products and Failing to Have Them Available in All Stores Covered by the Advertisements or Failure to Have Them at the Prices Advertised is Unfair, Misleading and Deceptive

47. As already indicated, when A&P advertised a product at a particular price in the newspapers circulated in a particular area, A&P had an obligation to have such product available in its retail food stores in the area covered by the advertisement at the price advertised. Failure to meet this obligation, unless due to factors beyond A&P's control, is unfair, misleading and deceptive to members of the purchasing public, and is unfair to competitors.

48. As earlier found, A&P's advertisements constituted representations to members of the public by A&P that the products advertised would be available for purchase in any of the A&P stores in the areas covered by the advertisements at the prices advertised. The very purpose of A&P in disseminating advertisements was to cause members of the public to patronize A&P's retail food stores, drawing them by the attraction of the products advertised and the prices featured. A&P invited reliance on its advertisements, and the public properly had the right to rely, and to entertain the expectation that the advertised products would be in A&P's stores, and that the prices thereof would be the prices stated in the advertisements. To be sure, on occasion an advertised item will not be available and most shoppers know this. But that is not to say that shoppers anticipate that any significant and substantial numbers of items will not be available, or that any specific advertised item will not be available, or do not rely on the advertisements. Indeed, it would seem that if the public did not rely on advertisements, they would be wholly ineffective. Having advertised products for the purpose of inducing members of the public to travel to its stores to obtain them, respondent A&P is in no position to denigrate the significance of such advertisements or the products featured in them. Advertisements representing that particular products are available for sale in the retail food stores of A&P are unfair, misleading and deceptive if such products are not in fact available in such stores.

49. It is unfair and deceptive for A&P to advertise food and grocery products and other merchandise at certain prices, and then charge customers higher prices for the items. The Commission's survey found this to be happening in a significant number of instances in A&P's stores. A&P "checkers," as previously found, are instructed to ring up the price marked on the item. The former director of sales for the Cleveland Division testified to this effect, as follows (Weschler, Tr. 444-45):

> A. The price that is on the can. The shelf signs do not mean anything. Any kid coming

through the store could move 15 of those in two seconds. It is what is on the can that counts.

* * * * * * *

Q. You said the Checkers were told to read the price on the can. If the can is marked wrong, it gets checked out at the wrong price?

A. That is correct. That is because they have been told years back that they are not hired to be memory artists. They are hired to be a Cashier who checks out merchandise. In fact, they are told that they are wrong if they try to reprice because even in critical times like this, even the best price doesn't last. There is more danger of charging a wrong price if they resort to memory than if they make a routine of looking on every package they put through regardless of how common it is.

A&P's national sales director also testified that the checker is trained "to ring the price that is marked on the item" (Cairns, Tr. 1159). Thus, the customer will be charged the price on the item and if it is higher than the advertised price, *i.e.*, "overpriced," the customer will wind up paying the higher price. This will be the case unless the customer spots overpriced items and brings them to the attention of the cashier, or possibly in instances when the checker notes an item which appears to be overpriced and checks the price.

50. That customers in fact are charged the prices marked on the items is verified by evidence in the record which has to some extent been already discussed. The 1973 Commission survey provided for the purchase of advertised items which were marked with prices higher than those featured in the advertisements. About 121 items were purchased by surveyors of which about 79 percent were checked out at the higher price marked on the items. In a somewhat similar survey[3] in Raleigh, Durham and Chapel Hill, N.C., it was found that out of 142 items purchased which were marked with a price higher than the advertised price, 126 were checked out at the higher price marked, about 89 percent (see CX 268a-e, 269a-c).

The Existence of "Rain Check" or Substitution Policies Does Not Cure Unavailability of Advertised Products

51. Advertising products and then not having them available in stores covered by the advertisements has the potential for serious exploitation of the consuming public. Members of the public induced to go to an A&P store to obtain advertised products only to find them unavailable, not only suffer frustrations, but may have been caused to waste valuable time and effort. They may also have been put to the expense of public transportation, or of driving their cars significant distances. The existence of a "rain check" policy does not repair the

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[3] The North Carolina survey was withdrawn by complaint counsel, and is not in evidence except for certain limited aspects.

injury (see CX 17b, CX 18, CX 22c, CX 23, CX 24b, CX 25-CX 31, CX 35 and CX 37 which contain the printed "rain check" policy; Cairns, Tr. 1183-84). A "rain check" does not provide the customer with the product or products advertised at the time desired, and to obtain which the customer may have taken time and effort, and incurred expense, in traveling to a retail food store. When an advertised item is unavailable, and sought by a customer, a different item must be substituted, perhaps not wholly satisfactory, and perhaps at greater cost, or more time, effort and expense expended going to another store. Further, for customers not regularly shopping at a particular store, a "rain check" plainly requires a second trip with additional costs in time, effort, etc., with the possibility of unavailability on the second trip. Even for customers regularly patronizing a particular store, a "rain check" must be safeguarded, and a second hunt for the product undertaken with the possibility, as just mentioned, of continued unavailability. Although "better than nothing," a "rain check" does not cure, justify, or render permissible or acceptable the unavailability of advertised items.

52. Nor does A&P's "substitution" policy necessarily justify or cure the unfairness, deception and exploitation inherent in advertising products, and then not having them available in the stores covered by the advertisements. A&P allows a customer to obtain a "comparable" item at the advertised price, if the advertised item is not available (Cairns, Tr. 1187). As in the case of "rain checks" such a policy is beneficial, but certainly does not cure unavailability of advertised items. The practice of advertising certain items, and then offering different products to customers who responded to the advertisements appears to the undersigned quite unacceptable. This is true even where the items seem fully comparable. Customers are entitled to get what is advertised, and some customers, irrationally or not, want particular brands and no others (Weschler, Tr. 474-75; MacDonald, Tr. 841-42; Cairns, Tr. 1190-91; Dr. Holdren, Tr. 1483). Beyond that, however, for some advertised items there are no substitutes, i.e., "top round roast," "chicken cutlets," "bluefish," all featured in the (Bergen County) *Record* and unavailable in one or more stores in the Clifton-Paterson area (CX 275r). Furthermore, in most instances before a substitute item may be obtained by a customer, the unavailability of the advertised item must be established, brought to the attention of the store manager or other A&P employee in authority, the possibility of a substitute broached, and consent of the A&P employee to its substitution obtained.

53. Both "rain checks" and A&P's "substitution" policy subject customers who have been induced by A&P's advertisements to come to its stores to inconvenience, delay and possibly irritation. In stores

which may well be crowded, to obtain a "rain check" or a substitute item, as indicated, customers conceivably pressed for time may have to hunt down a clerk, or even the manager or assistant manager, explain the unavailable but advertised item, and possibly wait while it is verified. If a "rain check" is issued, a customer must then wait until the next visit to the store to obtain the item, if it is still desired, and if it is even then available (see Loebsack, Tr. 214-220; Eliasen, Tr. 573-77). Similar factors apply to substitute items, except that the customer may have to reject a "rain check" and ask for a substitute, and the consent of the A&P employee obtained for the substitute. For these reasons neither "rain checks" nor "substitutions" appear to be in heavy use by consumers, amounting only to a few instances a week for each in one Detroit A&P store found to have had substantial unavailability (Loebsack, Tr. 220, 222) out of what must have been thousands of transactions (see also Koss, Tr. 350-51; Eliasen, Tr. 576; Okoniewski, Tr. 658).

Advertising Products and Failing to Have Them Available In All Stores Covered by the Advertisements or Failure to Have Them at the Prices Advertised is an Unfair Method of Competition

54. Advertising of prices is procompetitive and beneficial to the public being, in fact, a preeminent example of price competition. The advertising of prices makes prices and price reductions particularly visible and, when vigorously and honestly pursued, tends to keep prices low, or even to lower them (Dr. Katona, Tr. 1750). The advertising of items at low prices coupled with the failure to have such items in the stores covered by the advertisement, or available at the prices advertised, has the tendency and capacity to substantially injure competitors, and is an unfair method of competition. The advertising of products at low prices not in fact available in the stores of the advertiser, or not available at the prices advertised, may enable a firm to persuade the public that it has lower prices than its competitors when in fact it does not. Under such circumstances, a firm may gain a competitive advantage unfairly. Advertising products at low prices which are unavailable in the stores of the advertiser, or which are unavailable at the advertised prices, furthermore, has the tendency and capacity to destroy or erode public confidence in the truth of such price advertising, presently common among retail food store chains and supermarkets, since the public is likely to generalize from specific experience. Erosion of confidence in such advertising may have the tendency and capacity to reduce the effectiveness, and the competitive benefits to the public flowing from such advertising (see with respect

to this finding, Dr. Holdren, Tr. 477-1483, and Dr. Katona, Tr. 1750-52, 1774, 1778-79, 1786-87).

III

Discussion

The meaning conveyed to the public by A&P's advertisements is basic to the disposition of this proceeding. The undersigned has found that the advertisements represented that the products featured would be available for purchase in the retail food stores of A&P, in the areas covered by the advertisements, at the prices advertised during their effective periods. A&P vigorously disputes this interpretation (Proposed Findings, pp. 28-38; Answering Brief, pp. 4a-10) arguing that the advertisements make no explicit promise to this effect, that there is no guarantee of availability, and that the public does not expect perfection, well understanding that on occasion and for various reasons some items which were advertised will not be available in the stores of the advertiser. According to A&P, therefore, the advertisements were only understood by the public to mean that the advertised products would be available and correctly priced "in the great majority of cases," and that A&P used good business practices applied in good faith to prevent unavailability and mispricing.

The undersigned does not accept this view of the matter, finding that advertisements of A&P offering, for example, lamb chops at 99 cents a pound (CX 275j) or Florida oranges at 20 for 99 cents (CX 275mm), constituted in each instance a representation to the shopping public that those particular items would be available for purchase in the A&P stores in the areas where the advertisements were disseminated, at the prices advertised, during the effective periods stated. That is the meaning of the advertisements, and the undersigned can rationally find no other meaning in them. It seems to the undersigned a *non sequitur* to argue, because shoppers have learned from experience, if that is true, that *some* advertised products may not be available or correctly price marked as advertised, that A&P's advertisements do not represent that *specific* and *particular* advertised items will be available for sale in A&P's stores at the prices advertised. Development of tolerance by the public to unavailability of advertised items does not render the practice of advertising items and then not having them available in the stores of the advertiser any the less misleading. The advertisements of A&P made the representations alleged in Paragraph Five of the complaint. In the opinion of the undersigned, there is no ambiguity whatever in them. Unqualified A&P advertisements offering lamb chops at 99 cents a pound (CX 275j) and oranges at 20 for 99 cents (CX 275mm) represent and convey the "net impression" to the public that lamb chops and oranges can be purchased in any A&P store in the areas covered by the advertisements at 99 cents a pound and 20 for 99 cents, respectively. At the very least such advertisements have the tendency and capacity to convey such net impressions and representations, and that is all that is needed for a violation, *U.S. Retail Credit Ass'n* v. *Federal Trade Commission*, 300 F.2d 212 (4th Cir. 1962), *Firestone*, 81 F.T.C. 398, 450 (1972), *aff'd* 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112, if the representations or net impressions are false, as they are if the products are not in fact available or the customer is charged higher prices than those advertised. The Commission may determine the meaning or net impressions conveyed, and by extension the undersigned, based upon the advertisements themselves and the circumstances surrounding their publication. *Standard Oil Company of California*, order of Nov. 26, 1974; *Crown Central Petroleum*, order of Nov. 26, 1974; *Firestone, supra.*

Having concluded that the advertisements made the representations alleged, the issue then presented is the conclusions to be drawn from the unavailability and overpricing disclosed by the Commission's survey. A&P challenges the implications and conclusions drawn from those statistics. A&P criticizes treatment of all items as "fungible" by the survey, according all equal weight whether a "featured meat or produce" item or the "seventh and last flavor of a line of luncheon meats" (Proposed Findings, pp. 150-51). Although for counting purposes and items were treated alike, the record contains extensive evidence showing the exact items unavailable and overpriced, and many of these products have been enumerated in this decision. It is plain that unavailability and overpricing extended to every kind of item, those prominently featured in the advertisements and those accorded only a line, staples as well as luxuries. Beyond that, however, the undersigned perceives no infirmity in counting the number of items unavailable or overpriced, and calculating the degree of unavailability or overpricing on that basis. An attempt to weigh items in accordance with their presumed importance to the public would require value judgments among items, which would inject far greater problems. Although "horseradish root" to many is an esoteric product, if it is traditionally used during the Easter season by citizens of a particular ethnic extraction, it is clear that many persons may have been drawn to A&P stores in the Cleveland area by the offer of that product in one of A&P's advertisements (CX 275zz, reproduced [p. 631] herein). To dismiss its unavailability as of no importance is unwarranted.

In a somewhat similar argument aimed at the significance of the statistical results, A&P is critical on the ground that where an advertisement offered "Gelatin desserts, 7 flavors," each flavor was transcribed in the survey as an "item" so that if no gelatin dessert at all were available in a store, seven instances of unavailability were recorded. In contrast, if the advertisement offered "assorted flavors" only one "item" was involved. A&P is correct in contending that this is anomalous. But it seems to the undersigned to have had little significance in the overall results. Instances of this type were few in relation to the thousands of items advertised and surveyed. Furthermore, as complaint counsel point out (Reply to Respondent's Proposed Findings of Fact, pp. 9-10), A&P was probably not prejudiced by this system of counting and may even have been benefited in some instances. For example, in an advertisement published in the *Detroit News* on May 23, 1973 (CX 27a-b; CX 275t) A&P offered Funk & Wagnall's Encyclopedia. The 27 volumes of this offering were counted as 27 items. Hence, in the four Detroit stores surveyed, this Encyclopedia advertisement produced 108 items (4 x 27). In the four stores surveyed, seven volumes were unavailable resulting in a percentage of unavailability, insofar as the Encyclopedias were concerned, of 6.48 percent. On the other hand, the percentage of unavailability of advertised items overall for the four Detroit stores of A&P surveyed was 12.8 percent (CX 223b). If Encyclopedia volumes had not been counted as individual items, the unavailability percentage overall for the four Detroit stores would have been about 13.7 percent.[4] Finally, on this point, it is obvious that a consistent methodology had to be adopted for counting items advertised as available in a specific number of varieties or flavors, and those advertised as consisting only of an "assortment" or the equivalent. The methodology utilized in the Commission's survey seems to the undersigned to have been reasonable and not unfair to A&P.

A&P contends that unavailability, by and large, consisted of items of "trivial significance in terms of likely consumer demand" (Proposed Findings, p. 152). The advertised items found to be unavailable have been reviewed in detail. Overall they certainly do not seem to the undersigned to have been of "trivial significance." Furthermore, as already stated, the contention involves a value judgment which is inappropriate for A&P under the circumstances. Having advertised products for the purpose of inducing members of the public to patronize its retail food stores, A&P is in no position to disparage those advertised items found to be unavailable on the ground they were of trivial significance.

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[4] In all 864 items were surveyed in the Detroit stores which included 27 volumes of Funk & Wagnall's Encyclopedia advertised on May 23, 1973. Seven unavailable items were attributed to unavailable Encyclopedia volumes (CX 107; CX 108; CX 109). Counting Funk & Wagnall's Encyclopedia as one item in all four stores would have reduced the number of items surveyed to 760, i.e., instead of counting 27 volumes in each of four stores as 27 items, there would have been counted only one (1) item "Encyclopedias" in each store. The seven missing volumes would not have been counted as unavailable items. Hence, there would have been 104 unavailable items out of 760 surveyed (see CX 222a, which shows 111 unavailable items in the four Detroit A&P stores surveyed), or about 13.7 percent.

As already described, A&P insists that its internal procedures are soundly conceived, reasonable and adequate, and are applied in good faith to prevent unavailability and mispricing of advertised products (Proposed Findings, pp. 84-131). Much evidence was received in this proceeding concerning the methods by which A&P selects products for inclusion in its newspaper and other advertising, the procedures by which individual stores are advised in advance of the products which will be advertised, and the methods used to ensure that the advertised products are in fact available in the individual A&P stores at the prices advertised. As stated, there is a clear-cut A&P policy that every product advertised will be available for sale at the price advertised in every individual A&P store covered by an advertisement, unless a proper disclaimer has been published (RX A-15). The particular internal procedures to be followed to carry out this policy is a matter for A&P's management. The undersigned has no doubt that such procedures were soundly conceived, and to the extent applied, were applied in good faith. The result, however, is what counts and what the public is concerned with, and the record reveals that A&P's policies were not effective, that substantial and widespread unavailability and overpricing of advertised products existed in A&P's retail food stores. The great variability among A&P retail food stores in itself would appear to eliminate any conclusion that the overall level of unavailability and overpricing was the lowest attainable notwithstanding "soundly conceived" procedures applied in "good faith." As noted, 19 out of the 80 A&P retail food stores surveyed had four or fewer items unavailable, with an average of 2.5, out of an average of about 111 items surveyed. In contrast, 19 out of the 80 stores surveyed had 20 or more items unavailable, with an average of 26.6 out of an average of 164.1 items surveyed (CX 222a-c). A&P stores with high levels of unavailability and overpricing, and stores with low levels of both, were not limited to any particular size of store, or seemingly to A&P stores serving any particular type of neighborhood or clientele. The average number of unavailable advertised items in all 80 A&P stores surveyed was 12.5 (1000 divided by 80, see CX 224a). Individual stores of A&P showed a similar variation in items marked with higher prices than those advertised (CX 222a-c). There were 32 A&P stores with overpricing of two or fewer items, with an average of 1.25 whereas there were 26 A&P stores with between seven and 22 items overpriced, with an average of 10.2 (CX 222a-c). No contention has been made that the costs of operating the stores with few items unavailable or overpriced overall were any higher than the stores with many items unavailable or overpriced. Much unavailability resulted from the simple failure of individual store managers to order the items advertised (CX 225a-f and underlying survey forms in evidence). Similarly, as described, overpricing was attributed by A&P store managers to failure to check the prices of advertised items, a procedure already prescribed by A&P (Loebsack, Tr. 185; Koss, Tr. 330; Eliasen, Tr. 547; Okoniewski, Tr. 637). These are only a few of the factors serving to demonstrate that the levels of unavailability and overpricing revealed to exist in the retail food stores of A&P by the Commission's survey far exceeded any irreducible minimum beyond the power of A&P to eliminate without significantly increasing costs, and were not caused by circumstances beyond the control of A&P.

A&P argues that demands for "statistical perfection" and a "remorseless insistence" that each of the stores have all the items advertised at the prices advertised will impose "real burdens on food prices" (Answering Brief, p. 11), and further that cessation of price-oriented advertising is the only means of eliminating "with total certainty statistical discrepancies of the kind observed in the 1973 survey" (Proposed Findings, p. 208). With respect to the first argument, it seems somewhat incongruous for A&P, after endorsing the concept that every advertised item must be available in every store covered by an advertisement as "always" having been "Company policy" (RX A-15), to contend that insistence that the policy be observed will increase food costs. In any event, A&P produced no specific proof to support this argument. Mere assertions on such an issue are insufficient. Furthermore, the contrary is indicated by the fact that some A&P stores seem to be operating essentially in compliance with the policy, and the circumstance that observance of already established company procedures would eliminate much of the unavailability and overpricing of advertised items found by the Commission's survey.

The second argument of A&P suggests in effect that the degree of unavailability and overpricing found in its stores, that is, 13 percent of all advertised items, cannot be eliminated, and that it may have to abandon price-oriented advertising. What has been set out earlier in this initial decision demonstrates, in the opinion of the undersigned, that a substantial amount of unavailability and overpricing can be eliminated by A&P by following already established internal procedures with no effect on currently used price-oriented advertising. If A&P is suggesting that *all* unavailability and overpricing cannot be totally eliminated without abandoning price-oriented advertising, the answer is that no one, insofar as the undersigned understands the matter, is insisting on any such result. It is recognized that some unavailability and mispricing will always occur due to ineradicable human error, and to factors beyond the control of A&P. There is no insistence upon "perfection or near-perfection."

Another contention of A&P is that it serves inner-city neighborhoods "to a degree beyond any other chain" (Proposed Findings, pp. 51-58). A&P contends that its large number of stores in Manhattan, Bronx and certain sections of Brooklyn in the New York City area, and in inner-city locations in Detroit and Cleveland, for example, result in considerable lack of uniformity in the type of products stocked. Dr. Goodman, an expert called by A&P, testified that variations in ethnic background, income and other characteristics produced substantial variations in product demand, and that trends in food retailing are in the direction of accommodating such variations (Tr. 2572). According to Dr. Goodman, items which are popular in some neighborhoods are the subject of little or no demand in others, and that a requirement that every advertised item be carried in every store "often means" that, as a price of advertising, products must be forced into stores where there is little demand for them (Tr. 2575). A somewhat similar argument is that many A&P stores are located in "downtown" city areas, are consequently smaller than suburban stores, have less shelf space, and cannot stock all the items that larger stores in outlying areas can stock (Proposed Findings, pp. 50-51, 211; see also RX 1085, 1087, 1107, 1108). It may be noted that there is no contention that the foregoing types of stores overall are not profitable.

A&P asserts that if it is insisted that every advertised item be available in every store, small stores and inner-city stores serving "specialized constituencies defined in terms of race, ethnic background or income level" may have to be closed (Proposed Findings, pp. 211-12). The record establishes, however, that there are techniques, or combinations of techniques, available to A&P by which it can assure that advertised products will be available in such stores, or by which A&P can identify in its advertisements the stores in which particular advertised products can be found. A&P has the option of advertising a particular product, and no reason exists why local A&P management responsible for advertising can not determine whether the items planned for inclusion in advertisements are carried by all A&P stores in the area to be covered by the advertisements. Having made that determination, items available in all stores can be advertised. Where it is desired to advertise certain items only popular in stores with a particular clientele, there is no reason why the advertisement cannot list the stores where such items can be found (see CX 282, 283; RX 1034, 1153 and 1154). Similar techniques can be used where advertising allowances are available on condition particular products are advertised, and where opportunities are presented to buy on favorable terms products not usually carried. And in appropriate instances products to be advertised can be shipped to the stores covered where such products are not normally carried. Of course, management is A&P's province, as previously noted. The foregoing possibilities are mentioned only to indicate the unfounded nature, in the view of the undersigned, of arguments that small stores and inner-city stores may have to be closed if it is insisted that A&P's own policy that every advertised item be available in every A&P store covered by an advertisement be carried out.

A&P contends more broadly that insistence on such policy offers little or no real benefit to the public and, in fact, presents the possibility of actual harm in that there would be adverse consequences to A&P's efforts to distribute food and groceries at the lowest feasible cost, and injury to a wide range of "other important social values", *i.e.*, "vigorous competiton", service to "urban poor" and "minority" groups, and the pursuit of "employment goals" of various Civil Rights statutes (Answering Brief, pp. 2-4). What has already been written is applicable to most of these arguments. In the opinion of the undersigned, none of the consequences A&P claims to foresee are supported by the record. To insist that A&P have the products it advertises available in its stores, unless prevented by factors beyond its control, is neither unrealistic, arbitrary nor an example of bureaucratic meddling. On the contrary, it would seem to be a matter of elementary fairness. Indeed, A&P seems to concede as much since, as stated a number of times, its own policy is to require "all stores to stock all advertised items during a sale period," it being, as A&P's vice president for merchandising noted to all A&P Sales Directors, "only good business to have all advertised merchandise available at all times" (RX A-15).

Failure by A&P to live up to the representations of its advertisements has the tendency and capacity for substantial harm to the public. Harm has been done to any member of the public who has gone to an A&P store to purchase a product advertised, only to find it not available. If A&P contends that shoppers do not travel to supermarkets with the specific purpose of purchasing advertised items, that contention is rejected. The undersigned has enumerated many items in this decision which were advertised, and which were not available, which could well have drawn shoppers to A&P stores. In fact, the very purpose of A&P's advertisements, or one of its purposes, was to persuade members of the public to go to its stores by offering desirable or needed products at attractive prices. The unavailability of advertised items, multiplied many times over, has the tendency and capacity for substantial and serious injury to the public and to the competitive system.

Although the unavailability and overpricing found in the Commission's survey cannot be projected with statistical precision to the total number of A&P stores in the metropolitan areas listed in Finding 14 from which the 80 A&P stores surveyed were drawn or, *a fortiori*, to all A&P retail food stores (see Dr. Shumway, Tr. 2696-2740; Dr. Holdren, Tr. 1489), it seems obvious from the evidence in the record that unavailability and overpricing of advertised items cannot have been limited to the 80 A&P stores surveyed. That the Commission's survey by chance hit upon the only A&P stores with significant unavailability and overpricing is so remote a possibility that it may be disregarded. Indeed, there are indications that unavailability is a companywide problem (see, *e.g.*, CX 258a-d, CX 255c). For the purposes of this initial decision, however, it is unnecessary to make any projection of unavailability and overpricing beyond the 80 A&P stores surveyed to any larger group of A&P retail food stores.

It is fundamental that advertisements are to be interpreted on the basis of the "net impression" conveyed to the general populace. *National Bakers Services, Inc.* v. *Federal Trade Commission*, 329 F.2d 365 (7th Cir. 1964), and, as already stated, the "net impression" conveyed by A&P's advertisements was that the products listed or depicted were available for purchase in the retail food stores covered by the advertisements, at the prices advertised, during the effective periods of the advertisements. When A&P did not have the products listed or depicted, or did not have them at the prices advertised, the advertisements were false, misleading, and deceptive, or at the very least had the tendency and capacity to deceive. The latter is sufficient for a violation, as previously noted. The fact that A&P may not have intended to mislead or deceive does not expunge the unlawfulness. *Ford Motor Co.* v. *Federal Trade Commission*, 120 F.2d 175 (6th Cir. 1941); *Montgomery Ward & Co. Inc.* v. *Federal Trade Commission*, 379.2d 666 (7th Cir. 1967) *National Dynamics Corporation*, 82 F.T.C. 488 (1973). Overall, the practices of A&P, found herein, were unfair to the public, oppressive and exploitive. *Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

Although A&P has defended this case on the "merits," so to speak, in its Proposed Findings A&P has raised a question whether the practices challenged in the complaint are in interstate commerce. A&P contends that there has been a failure of proof on this requirement. The basis for A&P's contention is the claim that its advertising is essentially local, and that sales of the products advertised from individual A&P stores are "plainly and entirely so." A&P additionally contends that although many products carried by its supermarkets were procured from the channels of interstate commerce, others were obtained locally. According to A&P the failure to distingquish interstate products from locally procured products is of decisive significance if the outcome of this proceeding turns on whether particular advertised products were not in particular stores when surveyed, rather than on broader questions, *i.e.*, whether A&P's intentions were good, its procedures sound, and its performance adequate to meet the promises of its advertisements.

There is obviously no question that A&P is engaged in interstate commerce moving, as it does, vast quantities of food, grocery products and other merchandise in a continuous stream across state lines and into its warehouses and retail food stores for sale to the public. Under the circumstances it would be paradoxical, indeed, to conclude that the advertising and sale of food, groceries, and other merchandise, involved in this proceeding, were beyond the jurisdiction of the Commission. And, in the opinion of the undersigned, no such conclusion is warranted under applicable precedents. Notwithstanding the "local" purchase and sale of some products, the utilization of the channels of interstate trade by A&P in the movement and sale of others imparts an interstate character to the whole. *Safeway Stores, Inc.* v. *Federal Trade Commission*, 366 F.2d 795 (9th Cir. 1966), *cert. denied*, 386 U.S. 936 (1967). In that case, challenging price fixing in violation of Section 5, the bulk of the activities were local, involving bread manufactured and sold locally, but the shipment of a small amount in interstate commerce was sufficient to impress the whole with an interstate character subject to the jurisdiction of the Commission. Commission jurisdiction attaches in this matter to the whole of the advertising and sale of A&P's food, grocery products, and other merchandise, where there is massive movement of many of those products in interstate commerce. Viewed from another standpoint, A&P's "local" purchases and sales are so commingled, and have such a close, substantial and inseparable relationship with the advertising and sale of food, grocery products, and other merchandise moving in the channels of interstate commerce that the whole on this basis must be, and is, subject to Commission jurisdiction. *Ford Motor Company* v. *Federal Trade Commission*, 120 F.2d 175 (6th Cir. 1941); *Ashville Tobacco Board of Trade* v. *Federal Trade Commission*, 263 F.2d 502 (4th Cir. 1959); see also *Bakers of Washington*, 64 F.T.C. 1079 (1964).

A&P's advertisements, furthermore, were disseminated across state lines (CX 257). Interstate dissemination of advertising is an activity in "commerce" subjecting the acts and practices connected therewith to Commission jurisdiction. *Shafe* v. *Federal Trade Commission*, 256 F.2d 661 (6th Cir. 1958); *S. Klein Department Stores*, 57 F.T.C. 1543 (1960);

Surrey Sleep Products, Inc., 73 F.T.C. 523 (1968); *Bankers Security Corp.*, 57 F.T.C. 1219 (1960).

True, A&P's advertisements were aimed primarily at the local population since people generally shop in supermarkets and retail food stores near where they live. As a consequence, A&P insists, since there was no showing that the advertisements in issue induced, or had any likelihood of inducing, out-of-state readers to cross state lines to make purchases, there was no "nexus" between the acts and practices and the interstate advertising (see Proposed Findings, pp. 26-27, 214-19; Answering Brief, pp. 68-71). Hence, according to A&P, its advertising can not be used as a basis for subjecting its acts and practices in the sale of food, grocery products and other merchandise, to the Commission's jurisdiction. The undersigned does not read the foregoing cases as imposing the strict "nexus" insisted upon by A&P. In *Shafe* v. *Federal Trade Commission, supra*, the respondent had no intention of inducing, and indeed refused to make out-of-state sales. Nevertheless, his advertising in newspapers which crossed state lines subjected his wholly "local" sales to the Commission's jurisdiction notwithstanding the lack of showing that the advertising induced, or was likely to induce, out-of-state readers to cross into Michigan to make purchases. The fact that Section 12 was involved in *Shafe*, if anything, renders that case of greater significance on this point since A&P claims that that section is more restrictive than Section 5, covering only advertising for the "purpose" of inducing the purchase of food, drugs, etc., while Section 5 has no such requirement. The subject acts and practices of A&P were in "commerce" and subject to the jurisdiction of the Commission.

During the trial of this proceeding A&P moved for summary decision that the complaint failed to allege a violation of Section 12 of the Federal Trade Commission Act. A&P argued that the language of Section 12 and its legislative history made clear that it applied only to advertising which "misrepresents the intrinsic qualities, components, or consequences of the use of an item, that is, which contains qualitative misrepresentations" (Answering Brief, p. 54). Obviously the advertisements involved in this proceeding make no representations whatever concerning the intrinsic qualities of any of the products offered. Ruling on the motion was deferred until submission of the initial decision.

Sections 12 through 15, 15 U.S.C. §§52-55 (1970), were added to the Federal Trade Commission Act as part of the Wheeler-Lea Amendments of 1938. Section 12 made the dissemination of "any false advertisement" of "food, drugs, devices, or cosmetics" unlawful and an "unfair or deceptive act or practice," Section 13 provided procedures for obtaining injunctive relief against dissemination of false advertisements of such products pending administrative hearings, Section 14 established penalties, and Section 15 defined the term "false advertisement."

The legislative history of these sections makes clear that they were designed to provide the Commission with an expeditious and effective means for stopping advertising falsely representing the intrinsic qualities of food, drugs, devices, or cosmetics because advertising of that type posed great danger to the health of the public. Congress was concerned both with the danger presented by products harmful in themselves, and with the plight of the seriously ill who might be induced by false advertising to neglect proper treatment in favor of worthless nostrums. H.R. Rep. No. 1613, 75th Cong., 1st Sess. 1937, discussed the provisions which were later enacted as Sections 12 through 15, and confirms the conclusion that the legislation was designed to deal with the danger posed by misrepresentation of the inherent qualities of food, drugs, devices, or cosmetics. In explaining the need for legislation, the Report noted that (p. 4):

> * * * we cannot ignore the evil and abuses of advertising; the imposition upon the unsuspecting; and the downright criminality of *preying upon the sick* as well as the consuming public through fraudulent, false, or subtle misleading advertisements.
>
> * * * * * * *
>
> Among the most obvious needs of the Federal Trade Commission Act are those giving more effective control of advertisements *affecting the public health and fraudulent impositions as to its food and medicinal supplies.* (Emphasis added.)

The Report defined devices and cosmetics, making clear that they belong in the same category as food and drugs in that all are closely related to human health and safety (Report, pp. 6-7):

> Speaking generally, "devices" within the terms of the Act mean instruments and contrivances intended for use in the cure or treatment of disease.
>
> "Devices" are included within the provisions of the bill because of their close association with drugs *as a means for the treatment of physical* ills.
>
> Cosmetics are brought within the provisions of the bill because in many instances cosmetics are *injurious to health and produce physical injuries to the body.* (Emphasis added.)

The "Additional Views" attached to the Report contained the same emphasis (pp. 23, 27):

> It is universally recognized that the advertising of these commodities [food, drugs, devices or cosmetics] the intelligent purchase and *use of which are so essential to public health and welfare* must be safeguarded from the abuses—at all times too flagrant—of a small minority.

The various ways in which misrepresentations of quality posed a danger to human health were discussed (p. 27):

> The cases of injury to health resulting from the medicine itself are unusual * * * while there are occasional cases of this kind, the great bulk of patent medicine advertising is in the case of products that are innocuous, like the tuberculosis cure which was a simple

> liniment, or the diabetes cure which was a brew of horsetail weed. These are the *commodities responsible for most of the damage to health resulting from false advertising* * * * There have been many cases where persons who could have been cured by proper treatment have sunk to such a low condition while relying upon *worthless concoctions* that their cases have become hopeless* * * (Emphasis added.)

The Report reflects the views of Congress as expressed in floor debates on the amendments. A common theme was the public need for protection against advertisements which posed a threat to health or bodily well-being.

Commission commentary since enactment continues to express the intent reflected in the legislative history of Sections 12 through 15. In its "Statement of Basis and Purpose" accompanying the *Trade Regulation Rule for Cigarettes*, the Commission discussed the effect of Sections 12 through 15 on the interpretation and application of Section 5 (pp. 82-83, 92):

> The public policy declared by Congress in the food and drug sections of the Wheeler-Lea Act and in the specialized consumer-protection statutes is relevant in determining the requirements of the more general provisions of Section 5. The food and drug sections express a congressional determination that the lawful scope of a trade practice may depend in significant part upon the *nature of the product involved and its relationship to human health and safety** * *.
>
> * * * It seems clear that in adding Section 15 to the Trade Commission Act Congress was particularly concerned with the situation in which consumers are misled as to the *consequences of using a product to the detriment of their health or safety.* (Emphasis added.)

Case law confirms the Congressional purpose. Research has failed to reveal a case brought under Section 12 where the misrepresentations alleged did not concern the quality or consequences of the use of food, drugs, devices, or cosmetics.

The contention that misrepresentations other than those involving intrinsic qualities, components or consequences of use are encompassed by Section 12, in the opinion of the undersigned, does not bear scrutiny. *J.B. Williams Co.*, 68 F.T.C. 481 (1965), cited for this proposition, clearly involved qualitative misrepresentations. That case focused on the issue of the advertised beneficial effects of the use of "Geritol." 68 F.T.C. at, 546. The advertisements were found to be unlawful because they gave the false, misleading and deceptive impression that "Geritol" could relieve tired feelings of most persons. The Court of Appeals affirmed the Commission's determination of unlawfulness stating "[i]t is this representation that Geritol is good for most tiredness which is the inherent vice of the advertisements." *J.B. Williams* v. *Federal Trade Commission*, 381 F.2d 884, 891 (6th Cir. 1967). The "external" fact, cited by complaint counsel, that most persons suffering from tiredness do not have iron-deficiency anemia, in the opinion of the undersigned, does not support the contention that misrepresentations other than those involving intrinsic qualities are encompassed by

Section 12, but is merely the reason why the claims of beneficial results from "Geritol's" use were false. Likewise, reliance on *Thomsen-King* [*Co., Inc.*, 33 F.T.C. 126 (1941), seems equally unsound since that case also involved, among other things, qualitative misrepresentations. At issue was the advertised quality of cosmetics, part of an intricate swindle scheme. Paragraph 4 of the complaint alleged, and paragraph 4 of the Findings established, that the advertisements falsely represented that the cosmetics were of "national reputation" and were "of such quality that resale to the general public [was] not difficult." 33 F.T.C. at, 136, 155. Paragraph 7 of the complaint alleged that the advertising had misrepresented the effectiveness of the use of the cosmetics and paragraph 7 of the Findings so found. 33 F.T.C. at, 141, 160. The order entered specifically provided that respondents cease and desist from qualitative misrepresentations. 33 F.T.C. at 163. In its decision on an emergency motion for supersedeas, pending appeal from an order of the District Court granting a preliminary injunction restraining the dissemination of the advertisements, the Court of Appeals recognized that the quality of the cosmetics was at issue and dismissed objection that the advertisements went to "extraneous matters." 109 F.2d 516, 517, 518-19 (7th Cir. 1940).

The Commission in promulgating the Trade Regulation Rule relating to Retail Food Store Advertising and Marketing Practices, 16 C.F.R. §424 (1974), did not, as the undersigned reads the "Statement of Basis and Purpose," express the view that it had authority under Section 12 as well as under Section 5 over unavailability and overpricing. The pertinent language states only:

> In connection with the sale or offering for sale by retail foodstores of food and grocery products or other merchandise, *subject to the jurisdictional requirements of Sections 5 and 12* of the Federal Trade Commission Act, it is an unfair method of competition and an unfair or deceptive act or practice* * *. (Emphasis added.)

This does not express a view on the applicability of Section 12 to such practices. It does not make a determination of jurisdiction in any particular case, but merely says that if Sections 5 or 12 apply, the rule may be applied. Moreover, it appears to the undersigned from the "Statement of Basis and Purpose" that Section 5 alone was meant to cover the practices described in the rule. Thus, in the "Summary and Conclusions," referring to provisions in the proposed rule that were excised in the final form, it is stated (p. 18):

> * * * The Commission has concluded that the current practice of specifying in ads that an item is available only at those stores having a particular specialty department (delicatessen, fish, pastry) is not misleading or deceptive *within the purview of Section 5* of the Federal Trade Commission Act. Note III of the final rule explicitly permits such disclosure.

And further:

> The question of failure to disclose quantity limitations in retail food store advertising

has been the subject of a number of consumer complaints. The Commission has determined that such failure is clearly a false and misleading practice *within the purview of Section 5* of the Federal Trade Commission Act* * *. (Emphasis added.)

Nowhere in the statement is it said that the practices involved violate Section 12.

Finally, consideration of Section 12 in relation to Section 5 strongly supports the conclusion that Section 12 was meant to apply to advertisements falsely representing the intrinsic qualities or consequences of use of food, drugs, devices, or cosmetics. Section 5, as amended, encompasses any false, misleading, or deceptive advertising scheme, involving any product. Section 12, however, concerns certain products only: food, drugs, devices, or cosmetics. Section 12 seems clearly designed to provide for something not included in Section 5, and to be applicable when it is of particular significance that the product being advertised is food, drugs, devices, or cosmetics. The enactment of Section 13 providing for injunctive relief shows that Congress felt it was imperative that the Commission have the power to act expeditiously against false advertising which misrepresented the safety or therapeutic value of those products, to stop such advertising without delay. Those products were singled out for such treatment because they are ingested or applied to the body, and their use directly affects human health and safety. It follows that it is the false advertising of their intrinsic *qualities* or the *results of their use* that Section 12 was designed to reach. No other conclusion reconciles Section 12 with Section 5. In the present case it is of no significance that some of the products advertised happen to be food products. Use of the product is not involved; human health and safety are not at issue. Nor are the qualities or characteristics of the food products which were advertised. Indeed, a "mix" of products is involved in this matter, some food, others not food. If the argument of complaint counsel is correct, the liability of A&P under Section 12 is anomalous and purely fortuitous. If the advertised products had been all hardware, for example, Section 12 would clearly not have been involved, although all other aspects of this proceeding would have been essentially the same. In sum, Section 5 prohibits all false, misleading or deceptive advertising with respect to any product. Section 12 provides for injunctive relief for false, misleading or deceptive advertising relating to the intrinsic characteristics or consequences of use of food, drugs, devices, or cosmetics, *i.e.*, their safety, inherent qualities, therapeutic efficacy, etc. The latter factors are completely uninvolved in this proceeding. Section 12, therefore, has no application and the allegation in the complaint of a violation of that Section is dismissed. A&P's motion to this effect is granted.

IV

Conclusions

1. The Federal Trade Commission has jurisdiction over A&P, and over the acts and practices which are the subject of this proceeding.

2. The acts and practices which are the subject of this proceeding and of the foregoing findings of fact and discussion, including the advertising and sale of food and grocery products, and other merchandise, by A&P's retail food stores, are and were in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. The dissemination of advertisements by A&P listing or depicting food and grocery products, and other merchandise, for sale at particular prices represented to the purchasing public that such items would be readily available for sale at or below the prices stated in the advertisements in the retail food stores of A&P covered by the advertisements, during the effective periods of such advertisements.

4. In a substantial number of instances in a substantial number of retail food stores, the food and grocery products, and other merchandise, listed or depicted in the advertisements, as set out in paragraph 3, were not readily available for sale, or were not readily available for sale at or below the prices stated in the advertisements, or were not sold at or below the prices stated in the advertisements, by the retail food stores of A&P covered by the advertisements, during the effective periods of such advertisements.

5. The failure of A&P to have the food and grocery products, and other merchandise, listed or depicted in the advertisements as set out in paragraph 3, readily available for sale, or readily available for sale at or below the prices stated in the advertisements, or to sell such products at or below the prices stated in the advertisements, was not due to factors beyond the control of A&P, and the degree to which such failure occurred was greater than any irreducible minimum beyond the ability of A&P to eliminate, or to eliminate without incurring substantially higher costs.

6. By disseminating advertisements as set out in paragraph 3 and by failing to have the products advertised available in its retail food stores as set out in paragraph 4, A&P engaged in false, misleading and deceptive advertising, and engaged in unfair and deceptive acts and practices, and in unfair methods of competition, in commerce in violation of Section 5 of the Federal Trade Commission Act.

V

Remedy

Although the record discloses substantial and widespread unavailability of advertised items in A&P's retail food stores, there was nothing intentional or willful about this phenomenon. A&P did not advertise items with the intent of not having them available in the stores covered by the advertisements. On the contrary, there is evidence that on a number of occasions A&P went to extraordinary lengths, and incurred substantial additional costs, to honor the commitments of advertisements and to meet the demand for advertised items which had proved to be exceptionally popular, and whose sales had far exceeded expectations (MacDonald, Tr. 881-88; Cairns, Tr. 1302-03; Niezgoda, Tr. 1956-1962; Browning, Tr. 1084-86; Kammerer, Tr. 2011-16; RX 1067). As noted earlier, however, intent or willfulness are not elements of a violation, but presence or absence of those factors may bear on the order to be entered. *Federal Trade Commission* v. *National Lead Company*, 352 U.S. 419, 429 (1957). The unavailability of advertised items, as well as the overpricing uncovered by the Commission's 1973 survey, had their roots in A&P's internal procedures and, possibly, in the characteristics of A&P's operations, as this decision makes clear. Based on the evidence of record, the undersigned has concluded that A&P's advertisements were unfair, misleading and deceptive, constituted unfair and deceptive acts and practices and unfair methods of competition, and violated Section 5 of the Act. The entry of an order is necessary, all aspects of this matter having been considered.

Among other provisions, complaint counsel propose that (1) A&P be required to post in the front window of each of its stores, in letters two inches high and one inch wide, a list of advertised items not in stock and unavailable for sale, (2) A&P be required to post a clear and conspicuous notice in each of its retail stores that for any unavailable item not included in such list in the window, a customer will be entitled to receive any item the customer desires as a substitute so long as the retail price of such item does not exceed the advertised price of the unavailable item by 50 cents, and (3) A&P be required to post a conspicuous notice asking customers to report to store personnel items marked with an incorrect price, and advising that the first customer of the day to report a particular item which is overpriced is entitled to receive the item free or a one dollar credit toward the purchase thereof, whichever is less.

In the opinion of the undersigned, none of these provisions is appropriate or warranted on the record of this proceeding. They are rejected *in toto*. The requirement that every A&P store post a sign in the window in letters at least two inches high and one inch wide listing every advertised item which is unavailable is punitive, unnecessary to rectify the practices relating to unavailability disclosed by the record, and is of questionable value for the purpose of informing members of the public of advertised items not available in the stores (Dr. Katona, Tr. 1759-1760; Dr. Goodman, Tr. 2612, 2650-51; MacDonald, Tr. 865-66). As an alternative, the order issued herein requires a conspicuous sign disclosing unavailable advertised items to be posted at or near each doorway affording entrance to the public, and at or near the place where customers pay for merchandise. The second of complaint counsel's proposals is likewise punitive and unnecessary to end the violation, and additionally has the potential for subjecting A&P stores to unfair and disruptive harassment. The provision also has the potential for involving personnel of A&P operating its retail food stores in day-to-day conflicts and disputes with individual members of the public over whether or not advertised items are in fact unavailable. The provision is not in the public interest. It may be noted that A&P now has a "comparable item" policy which the evidence indicates is being honored in good faith by A&P's retail food stores.

Proposal (3) that each retail food store of A&P be required either to give to the first customer of the day who finds an advertised item marked with a price higher than the advertised price the item free, or a one dollar credit toward its purchase, also has the potential for harassment and disruption of A&P stores and the involving of personnel of A&P in conflicts with the public. The dubbing of this proposal the "treasure hunt" by counsel for A&P (Proposed Findings, p. A-1, Answering Brief, pp. 77-81) is essentially justified. It takes little imagination to conceive of the potential for mischief inherent in the provision. A&P stores could be the scene each day of hunts by the idle, young and old, searching shelves for items marked with prices higher than advertised, the reward being the item itself or a one dollar credit toward its purchase. Indeed, since price marking stamps are easily obtained, an order of this sort could be an invitation to petty thieves. As counsel for A&P point out, store managers could be drawn into disputes among claimants for the "prize" for first discovering an overpriced advertised item (Answering Brief, pp. 81-83). All in all the potential for trouble in this proposal is real and serious. In sum, as stated earlier, none of these proposals is warranted by the record, necessary to correct the unavailability and overpricing found to exist, or in the public interest.

VI

ORDER

It is ordered, That respondent The Great Atlantic & Pacific Tea Company, Inc., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereafter sometimes referred to as items, offered or sold in its retail stores, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly, disseminating, or causing the dissemination of any advertisement by any means which offers any items for sale at a stated price, unless during the effective period of the advertised offer at each retail store covered by the advertisement:

(1) Each advertised item is readily available for sale to customers in the public area of the store, or if not readily available there, a clear and conspicuous notice is posted where the item is regularly displayed which states that the item is in stock and may be obtained upon request, and said item is furnished on request;

(2) Each advertised item, which is usually and customarily individually marked with a price, is individually, clearly, and conspicuously marked with the advertised price or a lower price; *Provided*, That in the case of items which customarily contain no price markings, clear and conspicuous posting of the advertised price of such items at the point of display will be deemed in compliance with this requirement; *Provided further*, That, where optical scanning devices are used at "checkout" counters prices marked in code on items advertised below the regular shelf price need not be remarked;

(3) Each advertised item is sold to customers at the advertised price or a lower price;

Provided, It shall constitute a defense to a charge of unavailability under subparagraph (1) if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records as will show that (a) the advertised items were delivered to its stores in quantities sufficient to meet reasonably anticipated demand but were "sold out," or (b) the advertised items were ordered but not delivered due to circumstances beyond respondent's control, and that respondent, upon notice or knowledge of such non-delivery acted immediately to contact the media to revise the advertisement or proposed advertisement to reflect the limited availability or unavailability of each advertised item, and (c), if revision of the advertisement was not possible, respondent immediately offered to customers on inquiry a "rain check" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price. If respondent or any of its employees, agents or representatives are not advised of an alleged instance of unavailability through any source including the Federal Trade Commission within three months of its occurrence, it shall be presumed that the records called for by this proviso were in the possession of respondent showing (a) or (b), and (c), *unless* clear and convincing evidence establishes the contrary.

It is further ordered, That throughout each advertised sale period in each of its retail stores covered by an advertisement, respondent shall post conspicuously (1) at or near each doorway affording entrance to the public, and (2) at or near the place where customers pay for merchandise, notices which contain the following:

(1) A copy of the advertisement.

(2) A statement that: "All items advertised are readily available for sale at or below advertised price except the following items:

Rain checks will be gladly issued for these items which will enable you to purchase them at or below the advertised price in the near future. Comparable items may also be available, but you may insist on a rain check if you wish. If you have any questions, the store manager will be glad to assist you.

It is further ordered, That respondent shall cause the following statement to be clearly and conspicuously set forth in each advertisement which represents that items are available for sale at a stated price at any of its stores: "Each of these advertised items is required to be readily available for sale at or below the advertised price in each A&P store, except as specifically noted in this ad."

It is further ordered, That:

(1) Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities as to individual retail stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

(2) Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its retail stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

(3) Respondent shall, for a period of three (3) years subsequent to the date of this order:

(a) Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order;

(b) Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

(c) Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

(d) Respondent shall, all other provisions of this order notwithstanding, on or before each of the first three (3) anniversary dates on which this order becomes final, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order in the preceding year.

It is further ordered, That respondent shall notify the Commission at least thirty days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

FINAL ORDER

The administrative law judge filed his initial decision in this matter on Jan. 24, 1975, and service was completed on Feb. 6, 1975. Both parties filed notices of intention to appeal on Feb. 18, 1975, but the Commission was subsequently notified that neither side intended to perfect its appeal, and no appeal briefs were filed within the prescribed time. The Commission thereupon stayed the effective date of the Initial Decision, and has now determined that this matter should not be placed on its own docket for review, and that the Initial Decision should become effective as provided in Section 3.51 of the Commission's Rules of Practice. Therefore,

It is ordered, That the initial decision and order contained therein shall become effective on the date of issuance of this order.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it, file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with the order to cease and desist.

IN THE MATTER OF

EXXON CORPORATION, ET AL.*

Docket 8934. Order, Mar. 25, 1975

Affirmation of law judge's denial of respondents' motions to rescind the order for preservation of records.

ORDER AFFIRMING DENIAL OF MOTIONS TO RESCIND ORDER FOR PRESERVATION OF RECORDS

This matter is before us on respondents' appeal, pursuant to Section 3.23(d) of the Commission's Rules of Practice, from the administrative law judge's denial of their motions to rescind his Order for Preservation of Records, issued Nov. 12, 1974 [hereinafter sometimes referred to as "the Order"], which prohibits respondents and complaint counsel from destroying "all presently existing documents, writings, recordings, or other records of any kind whatsoever which relate in any way to the exploration, production, transportation, and refining of crude oil and the transportation and marketing of refined petroleum products* * *." The Commission placed this matter on its docket for review, solely on the question of the authority of the Commission and the law judge to issue a record-preservation order.

Although respondents are correct in pointing out that such an order has never been issued in a Commission proceeding, the failure to exercise a power does not necessarily prove its non-existence. *National Petroleum Refiners Association* v. *Federal Trade Commission*, 482 F.2d 672, 686 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). This is especially true when, as is the case here, the need for the order in question will arise only rarely. Normally, the parties to a suit will be able to identify the documents which they will need to support their respective cases with sufficient specificity to seek them by compulsory process. However, it is the position of complaint counsel that a considerable amount of discovery will be needed just to identify all of the relevant materials in respondents' possession. To prevent the destruction of such materials during this early phase of discovery, complaint counsel contend that the law judge should supervise the destruction of all materials which appear to be within the general scope of the case.

Thus the effect of this order, is not, as respondents have suggested, to require that they preserve irrelevant documents but, rather that they preserve records until their relevance to the proceeding can be determined with some degree of certainty. Respondents point out that the order has thus far caused them substantial burden and promises to cause them even more due to the expense of storing all of the documents encompassed by the order. However, if the order is within the power of the law judge to issue and he believes it necessary to the litigation, the hardship it brings upon the parties cannot be a ground for striking it. Furthermore, this burden can be, and has been, reduced by the law judge's permitting the destruction of materials which respondents can show are irrelevant, as well as those which can be duplicated from others. Order Interpreting Order for Preservation of Records, Nov. 27, 1974; Order Modifying Preservation Order, Feb. 6, 1975.

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* For appearances see p. 91, herein.

Having considered the pleadings filed by all parties in this matter, we conclude that the law judge acted properly in issuing an order of such nature. First, Section 5(b) of the Federal Trade Commission Act, empowering the Commission to conduct hearings into possible unfair methods of competition, necessarily implies the power to preserve evidence which might be needed in such hearings until it can be identified and brought before the Commission. This power is a logical extension of the fact finder's duty to make factual findings against a party which destroys material which is arguably relevant to the case at hand, concluding in that case that such material was relevant and contained information adverse to the party. Furthermore, Section 9 of the Act, in granting the Commission access to all evidence of any corporation against whom it is proceeding for inspection and copying must include the lesser power to merely preserve that which might be evidence.

We reject respondents' argument that the order is an "injunction," and that, as such, it can be obtained only from a court. We find the order to be analogous to a protective order which, although it may be prohibitive in nature and can govern the conduct of persons long after the conclusion of a proceeding has never, to our knowledge, been characterized as an injunction. In fact the order is distinguishable from an injunction in that it concerns the conduct of the proceeding rather than the actual merits thereof.

Having concluded that the Commission itself has the authority to preserve records, we also conclude that neither the Administrative Procedure Act nor any other applicable statute limits our authority to delegate such power to the law judge. In Section 556(c), the Act provides that employees presiding at hearings may, *inter alia*, "issue subpoenas authorized by law;" "rule on offers of proof and receive relevant evidence;" and "dispose of procedural requests or similar matters." These powers are essentially the same as those contained in the Federal Trade Commission Act and, for the reasons discussed above, they must include the power to preserve records. Likewise, we find that Section 3.42(c) of our rules empowering the law judges to "issue subpoenas," "rule upon offers of proof and receive evidence," and "rule upon * * * all procedural and other motions appropriate in an adjudicative proceeding," in fact delegates to them the record preservation power.

As stated at the outset, the only issue now before us is whether the Commission and its law judges have the authority to issue a document preservation order. However, to clarify this novel matter of Commission procedure, we will briefly comment on several points raised by respondents, which do not bear directly upon the question of authority. First, they argue that the law judge erred in issuing the order *ex parte*, since there is nothing in the record to indicate any need for departing from the normal procedure set forth in Section 3.22 of the rules. We agree, but conclude that the error was harmless inasmuch as the law judge provided for immediate review of the order and he permitted this appeal.

Respondents also urge that the order is unfair in that it applies only to them and to complaint counsel and not to the rest of the United States Government, from whom they expect to obtain a great deal of material for their defense. Respondents contend that the entire Government is a party to this proceeding since the Commission as an agency of the Government filed the complaint. Although the Commission is in fact part of the Government, for litigation purposes it is independent of other governmental bodies, such as Congress, the executive branch and the courts. The principle of this independence was confirmed in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 624, 625 (1935). Thus the fact that the Commission as a quasi-judicial, quasi-legislative body, is a party to an action does not mean that all other governmental bodies are also parties thereto.

Finally, respondents argue that complaint counsel failed to make an adequate showing of need for the order, especially because respondents' own procedures for preserving relevant evidence plus statutory prohibitions against the destruction of such evidence in Section 9 of the F.T.C. Act and 18 U.S.C. §§1101, 1505 (1970), fulfill the same function as the order. However, the question of need for a document preservation order, like the need for a protective order, is solely within the discretion of the law judge and, absent clear abuse thereof, which respondents have failed to show in this case, the Commission will not intervene. Accordingly,

It is ordered, That the law judge's denial of respondents' motions to rescind the order for Preservation of Records of Nov. 12, 1974, be, and it hereby is, affirmed.

IN THE MATTER OF

BRISTOL-MYERS COMPANY, ET AL.

Docket 8917. Order, Apr. 1, 1975

Rejection of administrative law judge's certification of respondents' requests for confidential treatment for documents produced under discovery demands.

Appearances

For the Commission: *Lynne C. McCoy.*

For the respondents: *Gilbert Weil* and *Gerald Guttman,* New York City.

ORDER REJECTING CERTIFICATION OF REQUESTS FOR CONFIDENTIAL TREATMENT

By order of Mar. 18, 1975, the administrative law judge certified to the Commission the motion of respondent Bristol-Myers, in which respondents Ted Bates & Company, Inc., and Young & Rubicam International, Inc., join, requesting: (1) that certain materials which they submit to complaint counsel be deemed unavailable for public inspection pursuant to Section 4.10(a)(2) of the Commission's Rules of Practice and (2) that respondents be notified ten days prior to the release of such materials under the procedures of Section 4.11 of the rules. Respondents request such treatment for all materials which they designate as "confidential" and which were denied protection in the Law Judge's order of Jan. 31, 1975.

The Commission, in its discretion, will agree to give advance notice before disclosing certain materials voluntarily submitted in connection with an investigation. However, this matter has gone past the investigation stage into adjudication. Once a matter enters adjudication the Commission will not consider requests for advance notice before disclosure where the ALJ has denied protective status for said materials, nor will it consider a request for advance determination that materials will be withheld from the public. Accordingly,

It is ordered, That the certification of respondents' requests for confidential treatment be, and it hereby is, rejected.

IN THE MATTER OF

GRAND FURS LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FUR PRODUCTS LABELING ACTS

Docket C-2654. Complaint, Apr. 3, 1975 - Decision, Apr. 3, 1975

Consent order requiring a Las Vegas, Nev., furrier, among other things to cease misbranding and falsely invoicing its fur products.

Appearances

For the Commission: *Gerald E. Wright.*

For the respondents: *John Peter Lee, Lee & Beasey,* Las Vegas, Nev.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Grand Furs, Ltd., a corporation, and Harry Brown, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Grand Furs Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its principal office and place of business located at 3645 Las Vegas Blvd., South, Las Vegas, Nev.

Respondent Harry Brown is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including those hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are retailers of fur products operating establishments at 3645 Las Vegas Blvd., S. Las Vegas, Nev., 3650 Las Vegas Blvd., S. Las Vegas, Nev. and 2901 Las Vegas Blvd., S. Las Vegas, Nev. The last two establishments operate under the name Harry Brown Furs.

PAR. 3. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the rules and regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the required name or RN number.
2. To show the true animal name of the animal or animals which produced the fur used in such fur product.
3. To disclose that the fur contained in the fur products was natural, bleached, dyed, or otherwise artificially colored, when such was the fact.
4. To disclose that the fur product was composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, or heads, when such was the fact.
5. To disclose the country of origin of imported fur products.
6. To disclose the required fur information in a legible manner on one side of the label.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the animal or animals which produced the fur used in such fur product.
2. To disclose that the fur contained in the fur product was natural, bleached, dyed or otherwise artificially colored, when such was the fact.

PAR. 6. The aforesaid acts and practices of respondents as herein alleged, are in violation of the Fur Products Labeling Act and the rules and regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Fur Products Labeling Act and the rules and regulations promulgated thereunder, and the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Grand Furs, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its principal office and place of business located at 3645 Las Vegas Blvd., S. Las Vegas, Nev.

Respondent Harry Brown is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of the corporation and his address is the same as that of corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That Grand Furs, Ltd., a corporation, its successors and assigns, and its officers, and Harry Brown, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding any fur product by:

1. Failing to affix a label to such fur product showing in words and in figures plainly legible all of the information required to be disclosed by each subsection of Section 4(2) of the Fur Products Labeling Act.

B. Falsely or deceptively invoicing any fur product by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words or figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

WARNER-LAMBERT COMPANY

Docket 8891. Order, Apr. 4, 1975.

Respondent's motion asking confirmation that reply brief is due on Apr. 8, 1975, granted.

Appearances

For the Commission: *Wallace S. Snyder* and *William S. Busker.*

For the respondent: *Herbert A. Bergson, Bergson, Borkland,* *Margolis & Adler*, Wash., D.C. *Mudge, Rose, Guthrie & Adler*, New York City.

ORDER CONFIRMING DEADLINE FOR FILING OF REPLY BRIEF

Having received official Commission service of complaint counsel's Answering Brief on Mar. 28, 1975, respondent asks confirmation that its Reply Brief is due on Apr. 8, 1975, even though that is the day before oral argument in this matter. Complaint counsel report that the Answering Brief was actually delivered to respondent's counsel on Mar. 26 and that a typewritten copy was sent two days earlier. Complaint counsel point out that Section 3.52(d) of the Commission's Rules of Practice allows a party seven days after the *receipt* of the Answering Brief to file a Reply Brief and argue that respondent should be deemed to have received the Answering Brief on Mar. 26. However, in view of the Commission's past practices in this and other matters, we conclude that respondent is justified in construing the date of official Commission service as the commencement of the seven-day period provided in Section 3.52(d). Accordingly,

It is ordered, That the aforesaid motion be, and it hereby is, granted.

IN THE MATTER OF

HARBOR BANANA DISTRIBUTORS, INC.

Docket 8795. Order, Apr. 9, 1975.

Denial of respondent's petition for relief from divestiture and for moratorium period to begin as of date of acquisition of McCann assets.

Appearances

For the Commission: *James T. Halverson.*

For the respondent: *Bernard Morris, Deutsch, Kerrigan & Stiles*, New Orleans, La.

ORDER DENYING PETITION FOR RECONSIDERATION

On Feb. 18, 1975, respondent petitioned the Commission pursuant to Section 3.55 of the Commission's Rules of Practice to reconsider the final order in this matter for the purpose of (1) relieving respondent of the obligation to divest those assets that constituted the Charles C. McCann Company and (2) measuring the ten year period disallowing acquisitions by respondent from the date Feb. 2, 1968 (the acquisition moratorium had been previously ordered to commence on Jan. 28, 1975, the date of service of the modified Commission order). Counsel supporting the complaint did not file a responsive statement.*

Respondent's petition for relief from divestiture is denied. Respondent has failed to demonstrate that the changed conditions it alleges have materially affected either the continuing need for the divestiture of the McCann assets or the ability of respondent to complete that divestiture. Competitive conditions have not been shown to have been restored in the marketplace. The petition is also barren of any showing that a good faith effort to divest has been made.

Respondent's motion to allow the 10 year moratorium on further acquisitions to begin as of the date of the acquisition of the McCann assets is also denied. Respondent was under no compulsion to suspend its acquisition activities during the pendency of this proceeding. That respondent may have imposed on itself a seven-year moratorium prior to the Commission's final order, as a reaction to an interest of Commission staff in this matter, is neither demonstrated nor relevant.

On review, the order is found to be reasonably related to the adjudged violation and fairly calculated to assist in the restoration of competitive conditions in the marketplace.

It is ordered, That the aforesaid petition be, and it hereby is, denied.

IN THE MATTER OF

HEALTH SPA INTERNATIONAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2655. Complaint, Apr. 11, 1975 - Decision, Apr. 11, 1975

Consent order requiring a Linwood, N.J., health spa and its Cherry Hill, N.J., credit arm, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Phyllis L. Kaye.*

For the respondents: *Pro se.*

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* On Feb. 27, 1975, counsel supporting the complaint requested that it be given until Mar. 31, 1975 to answer respondent "should the Commission desire same." Commission rules with respect to petitions for reconsideration do not provide for responses conditioned on invitation by the Commission and no such invitation was issued.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Health Spa International, Inc., and Concept Enterprises, Inc., corporations, and Jerry Katz, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Health Spa International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 515 Hamilton Ave., Linwood, N.J.

Respondent Concept Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 1702 Country Club Dr., Cherry Hill, N.J.

Respondent Jerry Katz is an individual and an officer of said corporations. He formulates, directs and controls the policies, acts and practices of the corporate respondents, and his principal business address is 515 Hamilton Ave., Linwood, N.J.

PAR. 2. Respondent Health Spa International, Inc., is now, and for some time last past, has been engaged in the advertising, offering for sale, and sale of figure improvement programs for men and women of the general public and in the general management and supervision of a figure salon located at 515 Hamilton Ave., Linwood, N.J.

Respondent Concept Enterprises, Inc., operating in its own name and through its division, Concept Credit Control, is now and for some time last past has been engaged in the financing of the purchase of figure improvement programs and the collection of patrons' accounts for respondent Health Spa International, Inc.

PAR. 3. In the ordinary course of their business as aforesaid, respondents regularly extend consumer credit and arrange for the extension of consumer credit, as "consumer credit" and "arrange for the extension of consumer credit" are defined in Sections 226.2(k) and 226.2(f) of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of their business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Section 226.2(n) of Regulation Z, respondents have caused and are causing their customers to enter into contracts for the sale of respondents' services. On these contracts, hereinafter referred to as "the contract," respondents provide certain consumer credit cost information. Respondents do not provide these customers with any other consumer credit cost disclosures.

PAR. 5. By and through the use of the contract set forth in Paragraph Four respondents have:

1. Failed to accurately disclose the amount of the downpayment in money made in connection with the credit sale, and to describe that amount as the "cash downpayment" as required by Section 226.8(c)(2) of Regulation Z.

2. Failed to accurately disclose the difference between the cash price and the total downpayment, and to describe that amount as the "unpaid balance of cash price" as required by Section 226.3(c)(3) of Regulation Z.

3. Failed to accurately disclose the sum of all charges required by Section 226.4 of Regulation Z to be included in the finance charge and to describe that amount as the "finance charge" as required by Section 226.8(c)(8)(i) of Regulation Z.

4. Failed to accurately disclose, as "total of payments," the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

5. Failed to accurately disclose the "deferred payment price" as the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, as required by Section 226.8(c)(8)(ii) of Regulation Z.

6. Failed to accurately disclose the annual percentage rate computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

PAR. 6. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Health Spa International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 515 Hamilton Ave., Linwood, N.J.

Respondent Concept Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 1702 Country Club Dr., Cherry Hill, N.J.

Respondent Jerry Katz is an individual and an officer of said corporations. He formulates, directs and controls the policies, acts and practices of the corporate respondents, and his principal business address is 515 Hamilton Ave., Linwood, N.J.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Health Spa International, Inc., and Concept Enterprises, Inc., corporations, their successors and assigns, and Jerry Katz, individually and as an officer of said corporations, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device in connection with any consumer credit sale or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. Section 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to accurately disclose the amount of the downpayment in money made in connection with the credit sale, and to describe that amount as the "cash downpayment" as required by Section 226.8(c)(2) of Regulation Z.

2. Failing to accurately disclose the difference between the cash price and the total downpayment, and to describe that amount as the "unpaid balance of cash price" as required by Section 226.8(c)(3) of Regulation Z.

3. Failing to accurately disclose the sum of all charges required by Section 226.4 of Regulation Z to be included in the finance charge and to describe that amount as the "finance charge" as required by Section 226.8(c)(8)(i) of Regulation Z.

4. Failing to accurately disclose, as "total of payments," the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

5. Failing to accurately disclose the "deferred payment price" as the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, as required by Section 226.8(c)(8)(ii) of Regulation Z.

6. Failing to accurately disclose the annual percentage rate computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

7. Failing, in any consumer credit transaction or advertisement, to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondent Health Spa International, Inc., prominently display the following notice in two or more locations in that portion of respondent's business premises most frequented by prospective customers, and in each location where customers normally sign consumer credit documents or other binding instruments. Such notice shall be considered prominently displayed only if so positioned as to be easily observed and read by the intended individuals:

NOTICE TO CREDIT CUSTOMERS

IF THE DEALER IS FINANCING OR ARRANGING THE FINANCING OF YOUR PURCHASE, YOU ARE ENTITLED TO CONSUMER CREDIT COST DISCLOSURES AS REQUIRED BY THE FEDERAL TRUTH IN LENDING ACT. THESE MUST BE PROVIDED TO YOU IN WRITING BEFORE YOU ARE ASKED TO SIGN ANY DOCUMENT OR OTHER PAPERS WHICH WOULD BIND YOU TO SUCH A PURCHASE.

It is further ordered, That respondents deliver a copy of this order to cease and desist to each operating division and to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies. No provisions of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

BRISTOL-MYERS COMPANY, ET AL.

DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8897. Complaint, Sept. 12, 1972 - Decision, Apr. 22, 1975

Order setting aside the initial decision of the administrative law judge and dismissing the complaint against a New York City seller and distributor of aerosol spray

anti-perspirants and its advertising agency for alleged false television demonstrations.

Appearances

For the Commission: *Lynne C. McCoy, William S. Busker* and *Charles E. Ludlam.*

For the respondents: *Gilbert H. Weil* and *Jay Sands Davis, Weil, Lee & Bergin,* New York City, for Bristol-Myers Company. *Leonard Orkin* and *Patricia Hatry, Davis, Gilbert, Levine & Schwartz,* New York City, for Ogilvy & Mather, Inc.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Bristol-Myers Company, a corporation, and Ogilvy & Mather, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bristol-Myers Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 345 Park Ave., in the city of New York, State of New York.

Respondent Ogilvy & Mather, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 2 E. 48th St., in the city of New York, State of New York.

PAR. 2. Respondent Bristol-Myers Company now and for some time last past, has been engaged in the sale and distribution of Dry Ban spray anti-perspirants, which when sold, are shipped to purchasers located in various states of the United States. Thus respondent Bristol-Myers maintains, and at all times mentioned herein has maintained, a substantial course of trade in said spray anti-perspirants in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent Ogilvy and Mather, Inc., now and for some time last past, has been the advertising agency for Bristol-Myers Company and now, and for some time last past, has prepared and placed for publication advertising material, including but not limited to the advertising referred to herein, to promote the sale of Bristol-Myers' Dry Ban spray anti-perspirant.

PAR. 3. Respondent Bristol-Myers Company at all times mentioned herein has been, and now is, in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of spray anti-perspirants of the same general kind and nature as those sold by respondent Bristol-Myers Company.

PAR. 4. In the course and conduct of its business and for the purpose of inducing the sale of the said Dry Ban spray anti-perspirant, respondents have advertised Dry Ban by means of demonstrations, and various statements used in connection therewith, in television broadcasts transmitted by television stations located in various States of the United States and in the District of Columbia having sufficient power to carry such broadcasts across state lines.

Said demonstrations and the statements used in connection therewith are contained in the following commercials, entitled "Rusty Rev," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses."

In the first four commercials, the same demonstration is used, whereby the "leading spray" and Dry Ban both are sprayed on a dark surface. The other spray appears white and thick; whereas, the Dry Ban appears completely clear and dry. At the conclusion of the demonstration, the voice-over asks, "Which do you prefer?"

In the commercial entitled "Glasses," two girls in an elevator spray Dry Ban and "a leading anti-perspirant spray" on separate eyeglass lenses. The "leading anti-perspirant spray" appears white and thick; whereas, the Dry Ban spray appears completely clear and dry. At this point, Girl #1 states, "I see the difference." The voice-over later announces, "Clear Dry Ban helps keep you feeling clean and dry."

PAR. 5. Through the use of the aforesaid demonstrations and the statements and representations used in connection therewith, respondents represent, directly or by implication, that said demonstrations are evidence which actually proves that Dry Ban is superior to competing anti-perspirant sprays because it is a dry spray that is not wet when applied to the body and because it leaves no visible residue when applied to the body.

PAR. 6. In truth and in fact:

1. Dry Ban is not a dry spray and it is wet when applied to the body, and

2. After application to the body, Dry Ban dries out leaving a visible residue.

The aforesaid demonstrations, including the statements and representations used in connection therewith, are not evidence which actually proves that Dry Ban is superior to competing anti-perspirant sprays. Therefore, the advertisements containing said demonstrations are false, misleading and deceptive.

PAR. 7. The use by the respondents of the aforesaid false, misleading and deceptive advertising and representations used in connection therewith has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said advertising and representations were and are true, and into the purchase of a substantial quantity of respondent Bristol-Myers' spray anti-perspirant because of such erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are, all to the prejudice and injury of the public and of respondent Bristol-Myers' competitors, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW JUDGE

NOVEMBER 28, 1973

ALLEGATIONS OF COMPLAINT

In a complaint served on Sept. 20, 1972, the Commission charged Bristol-Myers Company (hereinafter "Bristol-Myers") and its advertising agency, Ogilvy & Mather, Inc. (hereinafter "Ogilvy & Mather") with utilizing false, misleading, and deceptive practices in the advertising and sale of Bristol-Myers' Dry Ban spray anti-perspirant in violation of Section 5 of the Federal Trade Commission Act.

The complaint alleged that respondents promoted Dry Ban through a series of television commercials "Rusty Rev," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," each of which compared Dry Ban with a "leading" competitive spray by means of a demonstration. In the first four commercials, the "leading spray" and Dry Ban were both sprayed on a surface. According to the complaint, the "leading spray" appeared white and thick, whereas Dry Ban appeared completely clear and dry. A voice asked, "Which do you prefer?" In "Glasses," two girls in an elevator sprayed Dry Ban and "a leading anti-perspirant spray" on separate eyeglass lenses. The "leading anti-perspirant spray" appeared white and thick, whereas Dry Ban appeared completely clear and dry. One of the girls then said, "I see the difference." According to the complaint, the demonstration in each of the commercials represented to the consuming public that it was evidence actually proving that Dry Ban was superior to competing anti-perspirant sprays because it was a dry spray that was not wet when applied to the body, and because it left no visible residue.

The complaint charged, however, that Dry Ban was not in truth a dry spray, that it was wet when applied to the body, that after application it left a visible residue, and that the demonstration in each commercial was not evidence actually proving the contrary. Accordingly, the commercials and the demonstrations in each were challenged as being false, misleading and deceptive.

Bristol-Myers and Ogilvy & Mather denied these allegations in answers filed Oct. 10, 1972, and Oct. 18, 1972, respectively. After pretrial proceedings, including discovery by each side and the disposition of a number of motions and other matters, hearings on the merits were completed and the record was closed on July 5, 1973. As a result of certain contentions relating to the product coverage of the notice order advanced by complaint counsel for the first time in their proposed findings, proceedings were reopened by the undersigned on Aug. 31, 1973, on motion of respondent Bristol-Myers to permit the offer of evidence limited to the product coverage of the order proposed by complaint counsel. A hearing was held on Oct. 9, 1973, and the record was again closed on Oct. 10, 1973.

This matter is now before the undersigned for initial decision based on the allegations of the complaint, answers, evidence, and the proposed findings of fact, conclusions, and briefs filed by counsel for respondents and complaint counsel. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having considered the entire record, makes the following findings and conclusions and issues the order set out at the end hereof:

FINDINGS OF FACT

Respondents

1. Respondent Bristol-Myers is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 345 Park Avenue, New York, N.Y. Bristol-Myers markets a wide variety of over-the-counter pharmaceuticals, cosmetics, and household products, including such well-known items as Bufferin, Excedrin, Bromo Quinine, Sal Hepatica, Vitalis, Clairol, and many others (CX 84; BMRX 2; Edmondson, Tr. 1627).[1] Respondent Bristol-Myers has since 1968 been engaged in the sale and distribution of Dry Ban spray anti-perspirant (CX 86(1)). Annual sales volume of all products by Bristol-Myers is over $1,000,000,000, and total advertising expenditures are approximately $225,000,000 (Edmondson, Tr. 1630).

2. Respondent Ogilvy & Mather is a corporation organized, existing and doing business under and by virtue of the laws of the State of New

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[1] "CX" - Complaint Counsel's Exhibit; "BMRX" - Bristol - Myers' Exhibit; "OMRX" - Ogilvy & Mather's Exhibit; "Tr." - Transcript Page.

York, with its principal office and place of business at 2 E. 48th St., N.Y., N.Y. Ogilvy & Mather is one of the nation's largest advertising agencies with billings in the United States alone of $200,000,000 annually, and has handled the promotion of consumer products for many of the nation's major corporations including respondent Bristol-Myers.

3. Bristol-Myers for a considerable period has sold and shipped Dry Ban to purchasers located throughout the United States, and has maintained a substantial course of trade and commerce in Dry Ban as "commerce" is defined in the Federal Trade Commission Act. At all times mentioned in the complaint, Bristol-Myers has been, and now is, in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of spray anti-perspirants of the same general kind and nature as sold by respondent Bristol-Myers.

4. Ogilvy & Mather for a substantial period prepared and placed for dissemination advertising materials to promote the sale of Bristol-Myers' Dry Ban, and was the advertising agency which prepared and disseminated the commercials challenged in the complaint (CX 12, 14, 18). Ogilvy & Mather, at all times mentioned in the complaint, has been, and now is, in substantial competition in commerce with other individuals, firms and corporations engaged in the advertising business.

5. Respondents Bristol-Myers and Ogilvy & Mather have advertised Dry Ban by means of demonstrations and various statements used in connection therewith, as set out later herein, in television broadcasts transmitted by stations located in various States of the United States and in the District of Columbia having sufficient power to carry such broadcasts across state lines.

Dry Ban

6. When Dry Ban was introduced by Bristol-Myers late in 1968, it was promoted as a superior aerosol deodorant competing with such brands as Arrid, Right Guard, Secret, Avon, Mum, Mennen, and others (CX 86, 47 (18)). Spray anti-perspirant products are heavily utilized by the consuming public, and constitute the most important of all aerosol product categories (CX 85). Production of aerosol spray anti-perspirants and deodorants in 1970 amounted to 482,000,000 units obviously involving enormous consumer expenditures (CX 85(13)). Sales of Dry Ban in 1969 amounted to $7,385,000, and grew to $7,891,000 in 1970 (CX 83).

7. Dry Ban aerosol spray anti-perspirant was formulated with an alcohol base (CX 12) which looked clear when sprayed on a surface, whereas major competing brands of aerosol spray anti-perspirants then on the market were formulated with an oil base which, when sprayed

on a surface, produced an oily, opaque and whitish or creamy appearance (Mayers, Tr. 1151-1154; CX 86(6)(13); CX 75(2)).

The Challenged Commercials

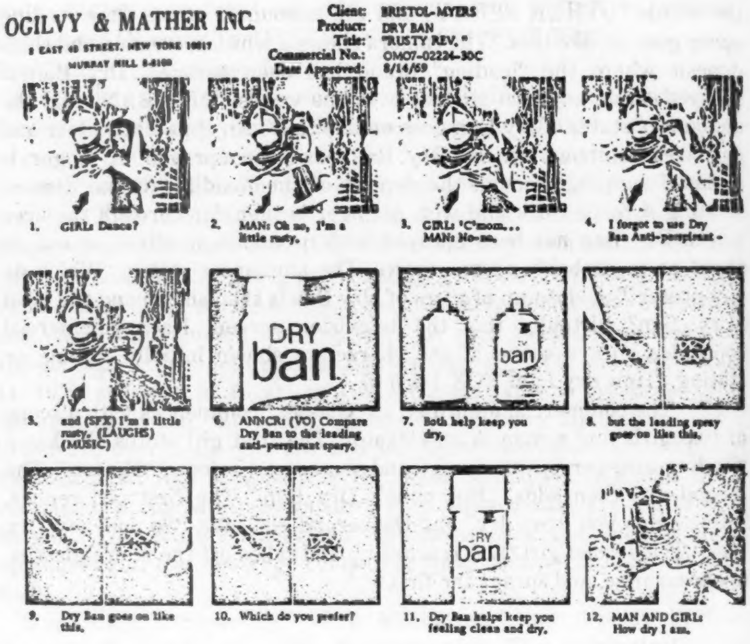
8. Shortly after the introduction of Dry Ban it was determined by respondent Bristol-Myers and its advertising agency, Ogilvy & Mather, to exploit the difference between the "clear, clean" and "quick drying formula" of Dry Ban and the "oily, opaque" formula of competing brands (CX 86 (2-6); Mayers, Tr. 1150). A number of commercials were prepared for broadcast over television containing comparative demonstrations utilizing the foregoing strategy (CX 14, 17, 23-24). The five commercials listed earlier herein were ultimately selected for broadcast and were disseminated over network or spot television during the approximately 14-month period between July 28, 1969, and September 11, 1970, at a cost of $5,800,000 (CX 81). "Rusty" was broadcast over network television, "Show-Up," "Glasses," and "Dry Manhattan" were broadcast over both network and on "spot" television, and "Spotty Performance" was utilized only for "spot" broadcast (CX 82). Each contained a comparative demonstration dramatizing the difference between Dry Ban's "clear, clean" appearance and the "oily, opaque" appearance of the "leading" competing spray anti-perspirant (CX 1-5, 6-10).

9. "Rusty," "Show-Up," "Dry Manhattan," and "Spotty Performance" all contain the same demonstration. The demonstration in "Glasses" is somewhat different, although employing essentially the same concept. A film of these five commercials is contained in the record (CX 1-5), and may be viewed with a suitable projector. The commercials on CX 1-5 are identical to those disseminated by respondents for actual broadcast purposes. The "storyboards" for these commercials are also in the record (CX 6-10). "Storyboards" are utilized in the advertising industry for conveying the basic idea and theme for commercials in use or under consideration, but are not fully representative of the actual commercial broadcast (CX 12). The storyboards for "Rusty" (CX 6) and "Glasses" (CX 10) are reproduced herein. The significance of these commercials cannot be fully appreciated, however, without viewing the entire commercial as broadcast over television (CX 1-5).

10. "Rusty," "Show-Up," "Dry Manhattan," and "Spotty Performance" all contain the following sequence: After a preliminary filming of two persons in a scene meant to be humorous, the camera shows a close-up of two cans of spray anti-perspirants, the "leading" brand which is not identified and a can of Dry Ban, and the announcer states, "Compare Dry Ban to the leading anti-perspirant spray." A sequence is then shown in which the "leading" brand is sprayed on a surface over

the words "OTHER SPRAY" and the announcer states, "the leading spray goes on like this." The camera shows a whitish, creamy, and thick deposit where the "leading" brand has been sprayed. Dry Ban is sprayed on an adjacent surface over the words "DRY BAN" and the announcer states, "Dry Ban goes on like this." An apparently clear and dry area is shown where Dry Ban has been sprayed. A finger is pictured running through the deposit of the "leading" brand demonstrating it to be thick and wet. A finger is then run through the area where Dry Ban has been sprayed with no apparent effect, or one so slight as to probably escape notice. The announcer states, "Which do you prefer?" A close-up of a can of Dry Ban is then shown and the label "Dry Ban" virtually fills the television screen. Each commercial concludes with a scene of the characters shown initially singing or stating, "How dry I am" (CX 1-4, 6-9).

11. The commercial identified as "Glasses" commences with a scene of two girls and a man in an elevator. The first girl states she has a "leading anti-perspirant spray" and the second rejoins, "Me too." The second girl then adds, "But mine's Dry Ban." The first girl replies, "Mine helps you keep dry" and the second girl says, "So does my Dry Ban." The second girl then reaches up and takes off the man's glasses, to his surprise, and sprays the first



OGILVY & MATHER INC.

8 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 8-6100

Client: BRISTOL-MYERS
Product: DRY BAN
Title: "RUSTY REV."
Commercial No.: OM07-02224-30C
Date Approved: 8/14/69

1. GIRL: Dance?

2. MAN: Oh no, I'm a little rusty.

3. GIRL: 'C'mom...
MAN: No-no.

4. I forgot to use Dry Ban Anti-perspirant -

5. and (SFX) I'm a little rusty. (LAUGHS) (MUSIC)

6. ANNCR: (VO) Compare Dry Ban to the leading anti-perspirant spary.

7. Both help keep you dry,

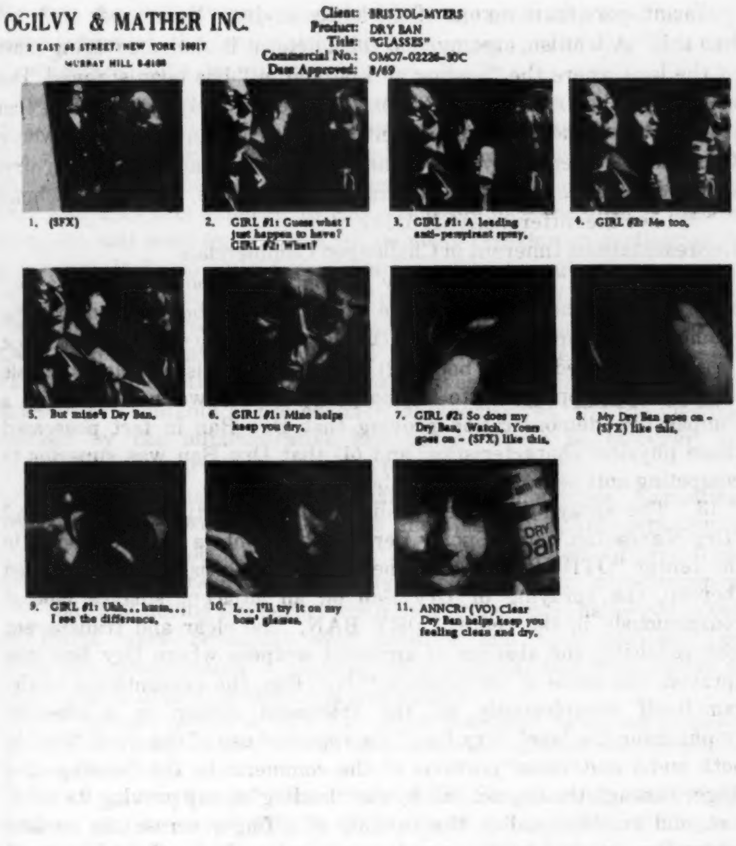
8. but the leading spray goes on like this.

9. Dry Ban goes on like this.

10. Which do you prefer?

11. Dry Ban helps keep you feeling clean and dry.

12. MAN AND GIRL: How dry I am.



OGILVY & MATHER INC.
2 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 8-6100

Client: BRISTOL-MYERS
Product: DRY BAN
Title: "GLASSES"
Commercial No.: OMO7-02226-30C
Date Approved: 8/69

1. (SFX)

2. GIRL #1: Guess what I just happen to have? GIRL #2: What?

3. GIRL #1: A leading anti-perspirant spray.

4. GIRL #2: Me too.

5. But mine's Dry Ban.

6. GIRL #1: Mine helps keep you dry.

7. GIRL #2: So does my Dry Ban. Watch. Yours goes on - (SFX) like this.

8. My Dry Ban goes on - (SFX) like this.

9. GIRL #1: Uhh...hmm... I see the difference.

10. I...I'll try it on my boss' glasses.

11. ANNCR: (VO) Clear Dry Ban helps keep you feeling clean and dry.

girl's anti-perspirant on one of the lenses saying, "Yours goes on * * * like this." A whitish, creamy, and thick deposit is shown covering most of the lens where the "leading anti-perspirant" has been sprayed. The second girl then sprays Dry Ban on the other lens saying, "My Dry Ban goes on * * * like this." The camera shows a close-up of the lens where Dry Ban has been sprayed revealing it to be clear and apparently dry, without a visible deposit. The first girl then says, "Uhh * * * hmm * * * I see the difference (CX 5, 10).

Representations Inherent in Challenged Commercials

12. "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" had the capacity to convey to members of the viewing public the net impression (1) that Dry Ban was a dry spray that was not wet when applied to the body; (2) that it left no discernible or visible residue after application to the body; (3) that viewers were seeing a comparative demonstration proving that Dry Ban in fact possessed those physical characteristics; and (4) that Dry Ban was superior to competing anti-perspirant sprays because of them.

13. The spraying of the "leading" spray in "Rusty," "Show-Up," "Dry Manhattan," and "Spotty Performance" onto a surface labeled in the center "OTHER SPRAY," the thick and whitish spray deposited thereon, the spraying of Dry Ban on an adjacent surface labeled conspicuously in the center "DRY BAN," the clear and transparent look resulting, the absence of apparent wetness where Dry Ban was sprayed, the name of the product "Dry" Ban, the presentation of the can itself conspicuously on the television screen in a close-up emphasizing the label "Dry Ban," the repeated use of the word "dry" in both audio and visual portions of the commercials, the running of a finger through the deposit left by the "leading" spray proving its thick, wet, and creamy quality, the running of a finger across the surface where Dry Ban had been sprayed showing virtually no visible result, all collectively had the tendency and capacity to represent to the viewing public that Dry Ban was dry, went on dry and left no discernible or visible residue on application, and that a real demonstration was taking place actually proving those characteristics, and the superiority of Dry Ban because of them. "Glasses" likewise had the foregoing tendency and capacity. In "Glasses," the "leading" spray was shown to be thick, wet, and creamy, with a heavy residue. In contrast, Dry Ban was seen to be clear and transparent, in fact, practically invisible with little or no sign at all of wetness or of any deposit on the glasses' lens. As in the foregoing four commercials, the word "dry" was repeated many times in the voice accompaniment, and the can showing "Dry" Ban was held up prominently at the end. Holding the pair of glasses up after spraying them revealed to the television audience that it was impossible to see

through the glasses' lens which had been sprayed with the "leading" spray, although the lens which had been sprayed with Dry Ban was clear and without a deposit.

The fact that the statements and representations in the commercials may also have had the ability to communicate the message that Dry Ban was "clear" or "non-greasy," or helped "keep you dry," did not in any way negate the fact that the representations were communicated that Dry Ban was superior to competing products because it was *in itself* dry and went on dry, and left no visible residue on application to the body. It is possible for a commercial to be subject to several different interpretations by the public. The conclusion that the challenged commercials had the tendency and the capacity to convey the foregoing representations, and that viewers were being shown demonstrations actually proving those representations, is made on the basis of the contents of the commercials themselves, and the viewing thereof by the administrative law judge. There is, however, an abundance of confirming evidence in the record.

Concept of Demonstration in Challenged Commercials Exploiting Differences in Formula of Dry Ban and Competing Anti-perspirants

14. The basic alcohol formula for Dry Ban, as stated, differed from competing anti-perspirant deodorants at the time of the introduction of Dry Ban, and during the period when the commercials challenged in the complaint were broadcast over network and spot television, or otherwise disseminated. A contemporary memorandum from Ogilvy & Mather to an official of Bristol-Myers stated:

> * * * the basic formula of DRY BAN differs from other leading anti-perspirant sprays, (Secret excepted) the DRY BAN spray appears quite different when applied to a clean surface (CX 23).

Dry Ban appeared to be "clear, clean" while the others appeared "oily, opaque" and "creamy" (CX 15, 17, 74, 75, 86 (6-14); BMRX-6; Mayers, Tr. 1150-54). The "clear, clean" appearance of Dry Ban in contrast to the "oily, opaque" and "creamy" appearance of competing spray anti-perspirants formulated with an oil base held true whether the surface on which such deodorants were sprayed was plastic, skin, or something else (CX 17).

15. The difference in appearance between Dry Ban and competing spray anti-perspirants formulated with an oil base was uniquely subject to a comparative demonstration *on film* which had the capacity to convey a false, misleading, and deceptive impression of the true physical characteristics of Dry Ban. A *live* comparative demonstration in which Dry Ban and an oil base competing spray anti-perspirant are sprayed in juxtaposition results in the perception of Dry Ban as watery, wet, and runny (CX 76; Tr. 845-849).

16. Respondent Bristol-Myers and its advertising agency, Ogilvy &

Mather, concluded that television commercials incorporating a demonstration of the "clear, clean" characteristic of Dry Ban due to its alcohol base in contrast to the "oily, opaque" and "creamy" appearance of a competitive brand might prove an effective advertising device to persuade members of the public to purchase Dry Ban (Mayers, Tr. 1150-56; CX 86(2)). It was determined by respondents to replace the prior advertising strategy by a filmed demonstration of the difference between Dry Ban's "clear, clean" appearance and the "oily, opaque" and "creamy" appearance of a leading competitive brand (CX 56, 57, 86(7)). The president of Bristol-Myers Products Division testified:

> The idea of the demonstration was my concept. I had final approval of the commercials before they were put on the air (Mayers, Tr. 1150).

17. Although the basic concept and the representations made in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" exploiting Dry Ban's appearance versus that of a leading competitive brand of spray anti-perspirant was developed by respondent Bristol-Myers, the senior vice-president of Ogilvy & Mather wrote that his organization:

> * * * took the concept from its earliest stages to the finished production in an effort to dramatize the Bristol-Myers supplied product difference (CX 18).

Preliminary Testing by Respondents of Demonstration Exploiting "Clear, Clean" Formula of Dry Ban Versus "Oily, Opaque" And "Creamy" Formula of Competing Anti-perspirants and Results Disclosed

18. The concept of a television commercial utilizing a demonstration exploiting the "clear, clean" appearance of Dry Ban and contrasting it to the "oily, opaque" and "creamy" appearance of a leading competitive brand was initially tested with members of the consuming public. In a letter from a member of the Ogilvy & Mather organization to the Dry Ban "Product Manager" of respondent Bristol-Myers, it was reported that on Apr. 9 and 10, 1969, forty persons had been interviewed in a mobile van placed in a shopping center in Manhasset, N.Y. (CX 23, 75(3), 105). These consumers had been individually shown a videotape demonstrating the effect of spraying unidentified Dry Ban and another unidentified spray anti-perspirant on a flat piece of glass. The videotape demonstration (CX 75(23-24)), similar in essential respects to the demonstration contained in the challenged commercials, was reported by Ogilvy & Mather to Bristol-Myers in a research report entitled "A Communication Test Of The Dry Ban 'Greasy' Demonstration" to constitute in advertising an effective "reason why" consumers should purchase Dry Ban (CX 75(2)). A significant proportion of viewers preferred Dry Ban because it was perceived from the demonstration to be "Cleaner/Clearer/Invisible" and "Leaves No Film/Residue" (CX 75(9)).

19. On May 15 and 16, 1969, another test, this time by Schrader Research and Rating Service (Schrader, Tr. 217-19, 230), was conducted of a videotape demonstration of the clear formula of Dry Ban, labeled for the purpose of the test "Clear and Dry" and the competitive "creamy" or "greasy" formula. The test was conducted in a mobile van parked in a shopping center in the vicinity of New Brunswick, N.J. (CX 74(3-4)). The van was staffed by interviewers recruited by the Schrader organization for the purpose (Tr. 257). A questionnaire, previously prepared by the research department of Ogilvy & Mather (Tr. 230-31), was provided these interviewers who were briefed on the project. Women shoppers at the center were individually invited into the van to view the videotape and, immediately after seeing the film, were asked the questions contained in the questionnaire and their answers were recorded. A second and related test utilizing a pictured demonstration in a printed advertisement was conducted on May 22 and 23, 1969. The printed advertisement was shown to each woman volunteer and she was permitted to examine it for as long as she wished. It was then removed from sight, the woman volunteer was asked the questions in the questionnaire and her answers were recorded. Approximately 100 women were included in the test utilizing the videotape, and approximately 100 were shown the printed advertisement (CX 74(3-5)). Upon the conclusion of the test utilizing the videotape and the test with the printed advertisement, the responses of the two hundred women were noted, and the results were transmitted to Ogilvy & Mather (Tr. 263-64).

20. On receipt of the results from the Schrader organization, the Research Department of Ogilvy & Mather in June 1969 prepared a report for Bristol-Myers (CX 74; Tr. 425-27, 518) advising that, after seeing the videotape demonstration, the biggest advantages of "Clear and Dry" (Dry Ban) named by the women were that "it is clear and it is dry" (CX 74(8)). Table 3 of this report shows that a significant number of the women who viewed the videotape demonstration liked "Clear and Dry" (Dry Ban) because, among other things, they perceived the representation conveyed by the demonstration to be "It's dry" (CX 74(14)). Ogilvy & Mather likewise reported to respondent Bristol-Myers that a significant number of the women who were shown the printed advertisement picturing the demonstration also perceived the message conveyed about "Clear and Dry" (Dry Ban) to be "It's dry" (CX 74(14)).

21. Thereafter, still another van test was conducted on July 2, 1969, in a Philadelphia shopping center. It was reported in the letter, mentioned earlier, reviewing "DRY BAN Copy Research" from Ogilvy & Mather to Bristol-Myers that interviews had been conducted with 50

women who had been shown the "clear, clean" versus "oily, opaque" videotape demonstration, which had been inserted into a Dry Ban commercial known as "Laplanders." The objective of this consumer test was to determine whether the demonstration could effectively communicate Dry Ban's superiority over competition in the area of "dryness," and "being better for clothes." Ogilvy & Mather reported to the Bristol-Myers Dry Ban "Product Manager":

> Two-thirds of the women said the biggest difference between the competitive product and BAN is the dryness. Almost one-half of the women conveyed "BAN is dry" as the main idea of the commercial (CX 23(3)).

22. Preliminary testing of a demonstration basically like the demonstration ultimately used in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" thus disclosed that a significant and substantial proportion of viewers, among other communications, derived the message that Dry Ban was a dry spray, went on dry (like a powder), and left no film or visible residue on the body.

Testing by Respondents of Finished Commercials Utilizing "Clear, Clean" Versus "Oily, Opaque" Demonstration and Results Disclosed

23. A demonstration similar in essentials to that tested preliminarily, as set out in the prior findings, exploiting the difference in a film of the appearance of Dry Ban when sprayed on a surface and the appearance in the film of the "leading" spray anti-perspirant, was incorporated into "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses." These commercials were of short duration lasting 30 seconds, and were prepared for broadcast in the course of network television programs or as "spot" commercials. The foregoing four were completed and approved during July 1969 (CX 1-4, 6-9), and "Glasses" was completed in Aug. 1969 (CX 5, 10).

24. These commercials, and certain others employing either the identical demonstration or one essentially similar, see, *e.g.*, "Your Move" (CX 60(29)), "Spokeswoman" (CX 65(19)), and "Showcase" (CX 71(21)), were evaluated by Ogilvy & Mather, utilizing the Schrader organization, already mentioned, and two other advertising and market research firms, H. D. Ostberg Associates, Inc., and N. T. Fouriezos & Associates, Inc. (see Schrader, Tr. 246; Ostberg, Tr. 15; Rosen, Tr. 320). Each of these organizations submitted the results of their consumer tests to Ogilvy & Mather. In the case of the Schrader organization, such results consisted primarily of completed consumer interviews (Schrader, Tr. 263), whereas the Ostberg and Fouriezos organizations submitted full research reports (Sapirstein, Tr. 497-499, 509-11; CX 45, 47, 50, 58, 63, 66, 70). On receipt of the results of the testing performed by the Schrader, Ostberg and Fouriezos organizations, respondent Ogilvy & Mather prepared reports for Bristol-Myers on the commer-

cials or demonstrations being evaluated, and incorporated therein the results and information supplied by those firms (CX 23, 56-57, 59-61, 65, 67, 69 and 71).

25. The Schrader organization tested "Glasses" (CX 5, 10) in a shopping center in New Jersey pursuant to working arrangements with respondent Ogilvy & Mather (CX 61; Tr. 232-35, 246, 266-69). A mobile van was parked in a center, and 50 to 60 women shoppers (CX 61, 61(7)) found there were invited to view "Glasses." The commercial was shown to each of these women individually (Schrader, Tr. 250-53) and, immediately upon completion of the viewing, an interviewer asked the questions contained in a questionnaire previously prepared jointly with Ogilvy & Mather (CX 61(11-14)) concerning the messages communicated (Tr. 250-54). Among the questions were inquiries such as: "What do you think was the main idea of the commercial? In your own words, what do you think the manufacturer was trying to tell you in order to get you to try Ban?" (CX 61(12); Tr. 232-33). The answers to the questionnaires were written down and also were tape recorded (Tr. 256-58). The completed questionnaires and all tapes were transmitted to respondent Ogilvy & Mather (Tr. 272-73). The results were then tabulated (Sapirstein, Tr. 443) in a series of handwritten pages and were submitted to respondent Bristol-Myers with a covering letter of Sept. 26, 1969 (CX 61).

26. The Schrader test results transmitted by respondent Ogilvy & Mather to respondent Bristol-Myers by letter of Sept. 26, 1969, reported that most women who viewed "Glasses" saw that commercial as communicating the message "Ban is Dry," and that this quality was seen as an "advantage" and "meaningful." According to the handwritten report submitted by Ogilvy & Mather, "Glasses" "got the point across" that "Ban is dry." After seeing "Glasses," the women viewers, among other characterizations, "most frequently described" Ban as "Dry/not wet" and "Not messy (filmy)" (CX 61(5)). A large majority of the women viewing "Glasses" translated "Ban's dryness into personal terms," half doing so "spontaneously" (CX 61(6)). The "leading" spray anti-perspirant competing with Dry Ban was seen as "wet/watery/runny" (CX 61(5)). The Ogilvy & Mather representative advised Bristol-Myers that "Based upon this morning's meeting, it was decided to go national with 'Glasses':30 until we have the results of the on-air and R.E.A.P. tests" (CX 61). Various officials and representatives of respondent Bristol-Myers and respondent Ogilvy & Mather were sent copies (Sapirstein, Tr. 426, 449).

27. In the fall of 1969, pursuant to arrangements with Ogilvy & Mather, H. D. Ostberg Associates, Inc. conducted consumer surveys on "Glasses," "Rusty," and "Your Move." The latter had the same

demonstration as "Rusty," "Show-Up," "Dry Manhattan", and "Spotty Performance," but was never commercially used over television. These tests were quite similar to the van tests conducted by the Schrader organization except that the viewers who were shown the commercials were questioned approximately twenty-four hours later, rather than immediately after seeing the commercial in the van (CX 47, 50, and 63; Tr. 38-40). Such tests are known in the industry as "R.E.A.P." tests. In these tests, vans were located in shopping centers in the metropolitan areas of Philadelphia, Chicago, and Los Angeles. Members of the public, predominantly women who used spray anti-perspirants, were surveyed. Ladies were invited into the mobile van, and were individually shown three commercials, one of which was the Dry Ban commercial. Thereafter, within twenty-four hours, they were recontacted by telephone and questioned about what they had seen. The answers to the questions asked (see, *e.g.*, CX 47(25), (33), (38-41)) were recorded by the telephone interviewer. When all the telephone interviews had been completed, the Ostberg organization analyzed the responses, grouped them within a number of categories ("codes") (Examples: CX 47(8), CX 50(9)), and transmitted research reports to respondent Ogilvy & Mather. The reports set out the results of the tests in a series of tables with such headings as "Persuasion," "Copy Recall," "Reaction to Claims," "Brand Usage," "Main Difference Between Deodorants," "Way In Which Commercial Showed Ban To Be A Better Product," etc.

28. The research report evaluating "Rusty" submitted by the Ostberg organization to respondent Ogilvy & Mather in Sept. 1969 advised that 16 percent of the members of the public who were shown "Rusty," and who were interviewed by telephone within twenty-four hours, believed that the message communicated by this commercial was that the main difference between the two anti-perspirants shown in the demonstration in the commercial was that "Ban sprayed on dry (like a powder); starts dry, dries immediately" (CX 47(22)).

29. The research report evaluating "Glasses" submitted by the Ostberg organization to respondent Ogilvy & Mather in Nov. 1969 stated under "Correct Copy Point Recall" that 15 percent of those seeing this commercial thought that it conveyed the message that Dry Ban "Leaves no film; is clear, clean," and 14 percent thought it conveyed the message that Dry Ban "Sprays on dry" (CX 50(9)). According to this Ostberg report, 14 percent of those viewing "Glasses" had a "Correct Visual Recall (net)" of the "Glasses" commercial as communicating "Ban spraying on dry, going on dry" (CX 50(10)). The message perceived by 15 percent of the viewers contacted twenty-four hours later by telephone was that "Glasses" showed the main difference between the two deodorants to be that Dry Ban "Sprays on

dry, goes on dry," and 9 percent saw the message of "Glasses" to be "Ban is clean, leaves no film, is clean" (CX 50(14)).

30. A similar research report was submitted by the Ostberg organization to respondent Ogilvy & Mather on "Your Move" in Nov. 1969. "Your Move" was prepared for commercial broadcast over television by respondents, as noted, but was never so utilized. It was offered by complaint counsel and was received on the issue of the "intent" of respondents. The storyboard for "Your Move" is in the record (CX 60(29)). As stated, "Your Move" utilized the identical demonstration found in the first four commercials listed in the complaint. As in the case of the surveys conducted on "Rusty" and "Glasses," "Your Move" was evaluated by the Ostberg organization through a survey of consumers in shopping centers in Philadelphia, Chicago, and Los Angeles. The Ostberg organization reported to respondent Ogilvy & Mather that 18 percent of those who saw "Your Move" received the message that Dry Ban "Sprays on dry," and 9 percent perceived "Your Move" as conveying the message that Dry Ban "Leaves no film; is clear, clean" (CX 63(9)).

31. On Sept. 15, 1969, the Research Department of Ogilvy & Mather transmitted a report to respondent Bristol-Myers evaluating the commercial "Rusty," and incorporated in this report the results obtained by the Ostberg organization from the consumer surveys conducted in the Philadelphia, Chicago, and Los Angeles shopping centers. The report noted that approximately 200 women had been interviewed in Aug. 1969 in those three locations after having been shown "Rusty." Under "Communication of Ideas," respondent Ogilvy & Mather advised Bristol-Myers that "The idea that BAN is *in itself* dry, from the 'demonstration' section of the commercial, was recalled by one-quarter of the women, mostly in the general sense of either 'BAN is dry' or simply labeled 'Dry BAN' (16 percent)" (emphasis in original; CX 57(4)). The report also advised Bristol-Myers that when directly asked the point of the demonstration, that is, what was the main difference between the two anti-perspirants in the commercial, one-third of those recalling a difference (16 percent of total) said "BAN sprays on dry" (CX 57(6-7)). In the tables accompanying this report, Bristol-Myers was informed by Ogilvy & Mather that 16 percent of those who were interviewed by telephone 24 hours after viewing "Rusty" thought the main difference between the two anti-perspirants was that "BAN sprays on dry (like a powder/dries immediately)" (CX 57(15)).

32. On Dec. 5, 1969, the Research Department of respondent Ogilvy & Mather forwarded to respondent Bristol-Myers a report on the Ostberg organization's copy test of "Glasses" and "Your Move" (CX 60).

Ogilvy & Mather reminded respondent Bristol-Myers that "Glasses" and "Your Move" were two new demonstrations for Dry Ban, and had been "created with the primary objective of communicating that 'BAN is dry' and goes on clean and clear" (CX 60(3)). Bristol-Myers was advised that "Glasses" was "more successful" than "Rusty" in communicating the "primary copy point" that "Ban is dry." Before setting out specific data in a series of tables, Ogilvy & Mather advised Bristol-Myers (CX 60(9)):

> In conclusion, therefore, we feel that "Glasses" is the most effective commercial compared to "Rusty" and "Your Move." Not only is "Glasses" a powerful execution in terms of persuasion but it also best communicates the new BAN strategy-"BAN is dry."

Ogilvy & Mather reported that 34 percent of those who viewed "Glasses" and "Your Move" specifically mentioned that "Ban is dry," whereas for "Rusty" the comparable level was 24 percent (CX 60(6)). Additionally, Bristol-Myers was informed that the major difference perceived by viewers between the two anti-perspirants shown in "Glasses" was that "Ban is dry," and that the "most common visual mention for 'Glasses' consisted of 'BAN spraying on clearly, not filmy' " (CX 60(7)).

33. The Ostberg organization transmitted to respondent Ogilvy & Mather completed questionnaires obtained by telephone interviews within 24 hours with those who had been shown the Dry Ban commercials in the shopping centers in Philadelphia, Chicago, and Los Angeles, together with typed "verbatim" responses of those interviewed (Sapirstein, Tr. 499). These "verbatim" responses were incorporated by Ogilvy & Mather into some of their research reports to respondent Bristol-Myers (see, *e.g.*, CX 60(48-56)), and bear directly on the allegations of the complaint.

34. The following are some of the verbatim responses transmitted by respondent Ogilvy & Mather to respondent Bristol-Myers of members of the public who were interviewed by the Ostberg organization within 24 hours after being shown "Glasses." These reveal unmistakably that many of those interviewed received the communication from "Glasses" that Dry Ban was dry and not wet when applied to the body, and after application left no visible residue (CX 60(48-56); emphasis added):

> It keeps you dry all day. It's new and improved and has some chemical to do so. Stay dry all day long and yet have no odors. This lady showed it sprayed on something, and *how you wouldn't even see it.* It sort of dissolved before it even hit the object. * * *
>
> Ban *sprayed on dry - not wet.* * * * Ban wasn't messy or runny* * *
>
> *Sprays on dry,* but you have to use it sometimes twice a day.
>
> Put on man's glasses *to show how dry it was. Goes on dry* - stays dry.
>
> Sprayed on glasses on man in elevator. *Dry and clear.*
>
> Used man's glasses *to show difference of dry and wet.* Try it to stay dry.
>
> *Has no film* when you put it on. A lady spraying man's glasses. *It goes on dry.*

Dry - not wet. Glasses - *one wet, one dry.* Keeps you dryer.

One was foggy and one was *clear** * *

Ban is clear. Brand X is pasty and sticky. It dries faster. Woman spraying it on a man's glasses in elevator. *One is clear.*

Dry Ban keeps you dry. Sprays glasses on man to show the difference. *Goes on dry.* That it's the new Dry Ban. *It goes on dry* and keeps you dry longer.* * *

A woman grabbing man's glasses. Ban stresses the dry aspect.

The girls put Ban and another deodorant on eyeglasses. The other deodorant was wet and sticky, *but Ban was dry** * *

They used a pair of men's eyeglasses. *Ban didn't leave a film, whereas the other brand did. It doesn't leave a film on my skin* where other brands do.

Women in the elevator with a man wearing glasses. The glasses are removed and each lens is sprayed with a different deodorant. *Ban leaves the lens clear* and *the other one makes the lens filmy.*

It doesn't rub off and it *sprays on clear.* They sprayed it on a glass to show it was clear. That *it didn't leave a residue* on your clothes. It keeps you dry.

The gals were taking off a guy's glasses and spraying their deodorant on them. *One was wet and the other was dry. Ban was the one that was dry.* The other deodorant was drippy. *Ban is dry - not drippy.*

The other product was sticky and *Ban was clear.* Two women in an elevator spraying eyeglasses to show the difference. *It wouldn't show under your arm.*

* * * It goes on *in a dry spray* and stays that way.* * *

One is dry and the other a liquid. Ban is the dry one and the other one is wet and messy. A lady sprayed the two onto a pair of glasses and the *Ban went on and stayed dry* while the other one was all runny. That it is new and improved.

That it's a new Dry Ban *that goes on dry* and remains dry. It's an anti-perspirant type of a product. *Ban goes on dry.** * *

Ban sprays on clear and *doesn't leave a film.* In an elevator, they sprayed Ban on a man's glasses to show it *left no film.** * *

The girls took a pair of glasses off a man and they sprayed one lens with Ban and the other with another deodorant. Dry Ban was clear and didn't cloud. The other deodorant clouded the lens. It compared Ban with another product. *Ban didn't leave a residue.*

It didn't go on sticky. *It went on dry.* Three people in an elevator. Women were talking about underarm deodorant. They each had a bottle with them. They demonstrated on eyeglasses. *It doesn't go on wet. It goes on dry.*

Two women sprayed deodorant on some glasses. Both were extra dry deodorants. *Ban went on dry.* The other went on foamy. A poor guy's glasses were sprayed with the Ban and another deodorant. *Ban went on dry.*

One woman tells another that she bought the wrong kind of deodorant. Two women on an elevator. They put Ban on a person's glasses. One one side *it went on dry. You couldn't see it on the glasses.* That was Ban. The other side was foamy. *You would stay dry if the deodorant went on dry in the first place.*

A man's glasses. They tested the two deodorants. One side was filmy. *Ban didn't leave a film.*

Ban was extra-dry. In elevator. They took glasses and sprayed them with two deodorants. One was messy, *one was dry.** * *

It keeps you fresher and drier longer. Not sticky. Two girls and a man in an elevator. They sprayed some on his glasses and *there wasn't any film.* It's effective.

A lady said she used Ban and another lady said she used another brand. They sprayed two eyeglasses with Ban and a nameless product. *Ban left no trace at all.* The other left a trace on the lens. It is the best on the market.

It goes on dry. They sprayed it on glasses to show the difference.

It's new Dry Ban. They have added something to it that *makes it go on dry* and remain dry all day long.* * *

Clear and dry. A man's glasses being sprayed to show the clearness. Ban went on clearer.

It's new Dry Ban that keeps you dry and free from perspiration, wetness and odor for a longer period of time. This lady used it on glasses. She sprayed it on and *the Ban you didn't even see, but the other one ran all down the lens.* It was messy compared to Dry Ban. *It's dry* and not at all messy feeling.

It's supposed to go on dry and keep you dry from then on. *They sprayed it on and it was dry. Another brand was wet. That was the difference.* That it keeps you dry after it goes on.

Dry powder going on to keep you drier. Spraying it on a man's glasses.

Other deodorant was wet and Ban was dry. They sprayed it on glasses to show the difference. It keeps you dry longer.

Ban was drier than other deodorant. Using a man's glasses in an elevator. *Goes on dry.* Extra dry. *It sprays on dry.*

It's new, Dry Ban. It's in a new form with a new ingredient. *They sprayed glasses and the Ban showed nothing,* but the other brand was runny. It's not a messy, runny spray. It's new *and dry when you put it on.*

It's an extra dry deodorant. When you apply it, *it goes on dry and remains that way. It doesn't run and leave any film that can be messy* or itchy until it dries, or even after, for that matter. It's dry, if you like dry deodorants.

35. In Jan. 1970 and Mar. 1970, respondent Ogilvy & Mather submitted reports to respondent Bristol-Myers providing the results on two additional commercials: "Spokeswoman" and "Showcase." The storyboard for the former is in the record as CX 67(22), and for the latter, as stated, is CX 71(21). The demonstrations utilized in both of these commercials were quite similar to the demonstrations contained in the commercials identified in the complaint (CX 1-5; CX 6-10). These two reports (CX 67, 71) were offered by complaint counsel and received on the issue of the "intent" of respondents to communicate to members of the public that Dry Ban was a dry spray that was not wet when applied to the body, and that it left no visible residue when applied to the body.

36. In the report on "Showcase" (CX 71), Ogilvy & Mather advised Bristol-Myers that a significantly greater proportion of respondents viewing that commercial were able to "play back the major copy message, i.e., that 'BAN is dry' " (CX 71(4)). Ogilvy & Mather noted that this difference "may be influenced by the fact that at the time 'Showcase' was tested the 'Demonstration' strategy had been on-air for several months in a similar executional format (i.e., 'Glasses'), whereas no 'Demonstration' commercial had been aired prior to testing 'Glasses' " (CX 71(4)). In the same report Ogilvy & Mather advised Bristol-Myers that 60 percent of viewers were able to "playback at least one visual feature" of "Showcase" and that (CX 71(6)):

> "BAN spraying on dry/going on dry" (20%) and "BAN spraying on clearly/not filmy" (20%) were the most frequently mentioned visuals."

37. In Apr. 1970 Ogilvy & Mather reported to Bristol-Myers on a new commercial "What Are We Doing" advising that the major copy point was that Dry Ban keeps you dry whereas (CX 69(3)):

> "Glasses" major point is to communicate that BAN *IS* Dry.

38. In the report on the commercial "Spokeswoman" (CX 67(22)), Ogilvy & Mather informed Bristol-Myers that this commercial was "particularly successful in communication of the major copy message 'Ban is dry' " (CX 67(5)). Ogilvy & Mather stated (CX 67(5)):

> "Spokeswoman" was particularly successful in communication of the major copy message "Ban is dry." Playback of this message in "Spokeswoman" was almost twice as high (62%) as in "Glasses" (34%) and "Your Move" (34%) indicating that the "Spokeswoman" demonstration is a very clear and understandable one.

39. In addition to the consumer surveys conducted by the Schrader and Ostberg organizations, respondent Ogilvy & Mather utilized N. T. Fouriezos & Associates, Inc., already mentioned, for "on-air" testing (Rosen, Tr. 310). This type of survey utilized the technique of "splicing" the commercial to be tested into a specific program broadcast over television in a specific city. Thereafter, within 24 hours telephone interviews were conducted with people who viewed the program containing the test commercial (Rosen, Tr. 321). In the work done for Ogilvy & Mather, the commercial "Rusty" was incorporated into the "Doris Day" show (CX 45(18); CX 56(15)), and broadcast in the metropolitan areas of Denver, Kansas City, and Hartford (CX 45(2)). Thereafter, names were selected on a random basis from the telephone directory and the persons were called to see if they had seen the "Doris Day" show into which the test commercial had been "spliced." If so, the person was questioned as to the messages, if any, perceived from the commercial "Rusty" (Rosen, Tr. 319-327). In this manner 108 housewives (CX 56(15)) in the foregoing three cities, Kansas City (37), Denver (18), and Hartford (53), were telephonically interviewed. The replies of the housewives were recorded on a questionnaire (CX 56(37-40)), and the completed questionnaires were tabulated and submitted to respondent Ogilvy & Mather (Rosen, Tr. 316-17, 320-335; CX 56). The latter prepared a report which it submitted to respondent Bristol-Myers, evaluating "Rusty" from a number of standpoints. Attached to the report were the verbatim responses obtained by interviewers from the housewives telephoned (CX 56(30-33)). Each represented a verbatim comment reflecting a communication received from "Rusty" (CX 56(29)).

40. The following are verbatim responses transmitted by respondent Ogilvy & Mather to respondent Bristol-Myers of some of those who were interviewed by the Fouriezos organization within 24 hours after seeing "Rusty" on the "Doris Day" show (CX 56(15)(30-33). The

verbatim responses represented recall of communications which "definitely" came from "Rusty" (CX 56(30); emphasis added):

One kind not Ban was sprayed on and there was a line. Then Ban was sprayed and with Ban there wasn't a line. I said I saw a line down the center of the screen. *They said that Ban sprays on dry.* * * *

They sprayed it on something and then sprayed on another kind. *Then they ran their fingers through it to show Ban was dry and the other was wet.* The usual stuff about deodorant. That it was a spray. The message I got was that this was different from their usual deodorant by emphasizing that it was dry. That it was dry. *It is a dry spray - like a powder.*

Other deodorant sprayed on wet and *Ban sprayed on dry.* They had two metal discs. They sprayed one with Ban and one with another deodorant, then marked both with an X and the *Ban was dry and the other was wet and messy.* * * *

Cartoon figure and knight and lady at party. It keeps you dry. One was dry and the other was wet. It was more effective and dry. *It was dry and like a powder.*

Spray Ban - *showed Ban was dry* and other left you wet. Ban sprays on one article and other deodorant on another article. Leaves you dry. Kept you dry. Ban always leaves you dry.

* * * It's cool and dry. Just that it's dry and comfortable to use. *It is dry!*

* * *It has an extra dry quality. *Ban is the dry deodorant.*

41. In addition to the survey of the commercial "Rusty," N. T. Fouriezos & Associates, Inc. conducted a survey among members of the public on "Your Move" and "Glasses" (CX 58). The cities in which this survey was made were Salt Lake City, Kansas City, and Hartford. "Glasses" was spliced into the telecast of "That Girl" show (CX 59(9)). Approximately 100 housewives who had seen this show were reached by telephone a day after the broadcast. Respondent Ogilvy & Mather submitted a research report to respondent Bristol-Myers on the results of this "on-air" test by the Fouriezos organization (CX 59). In the introduction to this report, Ogilvy & Mather noted that "Rusty" was the "first commercial produced to communicate that BAN dries clear while other deodorants dry leaving a greasy film" (CX 59(3)). Ogilvy & Mather also noted that the "Rusty" commercial had "presented the non-greasy *demonstration within* the context of the *questions format*," but that "R.E.A.P. [Ostberg tests] and on-air recall testing [Fouriezos tests] had indicated that the approach utilized was neither persuasive nor did it communicate the BAN is dry strategy" (CX 59(3); emphasis in original). Ogilvy & Mather again noted that "Glasses" and "Your Move" had been "created with the primary objective of communicating that BAN is dry and goes on clear whereas other anti-perspirant deodorants go on wet and leave a greasy film" (CX 59(3)). Ogilvy & Mather reported to Bristol-Myers that 15 percent of the housewives interviewed who remembered seeing "Glasses" perceived the message that " 'Ban is Dry': Ban is Dry (drier), Ban goes on dry" (CX 59(6)), and that 14 percent of the housewives perceived the message "Ban is Dry" as the major difference between the two anti-perspirants (CX 59(7)).

42. The research report of Ogilvy & Mather transmitted to Bristol-Myers a substantial number of verbatim comments of housewives who had seen "Glasses" (CX 59(18-19, 20)). The following are some of the verbatim comments transmitted to Bristol-Myers (emphasis added):

> Two girls were in an elevator and one sprayed BAN on a man's glasses . . . *It goes on dry* and outsells other deodorants* * * *It goes on dry.*
>
> It showed a man with glasses. One deodorant was sprayed on one side, another deodorant was sprayed on the other. *One left a film the other didn't. One was wet,* the other was dry. *Ban was dry.* It's drier, it wasn't moist. Ban will not stick to clothes. *It's dry so the clothes will stay dry.*
>
> They sprayed deodorant on glasses. It's the leading anti-perspirant. It's better than others. *It goes on dry* and lasts longer.
>
> Two girls were spraying a man's glasses with two different deodorants. Ban didn't smear but the other one did smear. *It was dry.*
>
> It says it's dry. Two girls and a man were in an elevator. The girl sprayed the deodorant on the man's glasses. *It was dry. No wetness. Ban was dry, no wetness.*
>
> Someone sprayed someone's glasses. *Ban went on dry. It didn't leave you sticky.* It's a new idea that it fells [sic] dry when it goes on. *The deodorant shown, left a residue that was sticky.* You could not see through it, it wasn't clean.

43. Although "Your Move" was only tested but not used commercially, the verbatim comments of housewives seeing it, as reported to respondent Bristol-Myers by Ogilvy & Mather (CX 59(21-22)), are nevertheless material because the demonstration in "Your Move" is the same as that in "Rusty," "Show-Up," "Dry Manhattan," and "Spotty Performance." (The headings on CX 59(21) are contradictory; however, the undersigned interprets the verbatims on this document to apply to "Your Move.") The following were reported to Bristol-Myers:

> All I remember is the new dry brand. They put it on a blotter or paper and pulled their finger through it. *It goes on dry.* It's suppose [sic] to keep you dry. *Ban was dry and the other was not.*
>
> Ban was better. It was suppose [sic] to be drier. The fact it was drier. *Ban was dry and the other was wet.*
>
> *The regular deodorant goes on wet and Dry BAN goes on dry.* The regular deodorant makes a streak because it's wet. *It goes on dry and wouldn't you rather have one that goes on dry than one that goes on wet.* It goes on dry and keeps you dry. *It starts out dry and stays dry.*
>
> *It sprays on like a powder and your body isn't wet like the other kind.* This dry and won't make you wet. They sprayed two spots. *One was wet from the other deodorant, one was dry from the kind they were selling,* the anti-perspirant. *It goes on dry and you don't get wet. It's dry and not a wet deodorant* and it keeps you drier. You don't get wet as I said before. *That you don't have to wait and let the deodorant dry under your arms, it goes on dry* and keeps you dry. It keep [sic] your clothes dry. *You don't get wet using this and it goes on you dry.*
>
> There are two kinds, spray and powder. The spray was wet, *the powder was dry. One kept you dry and the other wet. There is no wetness.* [Ogilvy & Mather noted that this verbatim could have come from previous Ban commercials.]

44. William D. Wells, Professor of Psychology and Marketing, Graduate School of Business, University of Chicago, testified as an expert witness in this proceeding (Tr. 852, *et seq.;* CX 80). Dr. Wells

examined the research reports in the record prepared by the Schrader, Ostberg, and Fouriezos organizations, and the verbatim responses of members of the public who were interviewed which were included with them. Dr. Wells collected these verbatim responses and then grouped them under certain categories (CX 99, 100; see also, Tr. 900, 916-17, 930, 946-48, 950-55, 964, 1402, 1433-34, 1462-63, 1476). Dr. Wells found that a substantial number of the members of the public interviewed after seeing "Rusty," "Your Move," or "Glasses" reported receiving the communication that Dry Ban was a dry spray not wet on application to the body. Dr. Wells' chart was received in evidence, as follows (CX 99):

Mentioned Or Indicated Ban Sprays On Dry

Rusty On-Air (CX 56)	8/21	38%
Your Move On-Air (CX 59)	4/7	57%
Your Move R.E.A.P. (CX 60)	38/137	28%
Glasses On-Air (CX 59)	6/19	32%
Glasses R.E.A.P. (CX 60)	30/116	28%

After analysis of all the verbatim responses received from viewers seeing the foregoing commercials, Dr. Wells concluded that between 25 percent and 33 percent reported a perception that Dry Ban is dry and not wet when applied to the body (Wells, Tr. 947, 964). As the foregoing table reveals, out of 116 verbatim responses obtained by the Ostberg organization from consumers viewing "Glasses," Dr. Wells found that 30 or 28 percent indicated that the commercials conveyed the message that "Ban sprays on dry." With respect to "Your Move," Dr. Wells found that 28 percent of 137 verbatim responses obtained by the Ostberg organization mentioned or indicated receiving the message "Ban sprays on dry" (CX 99). Dr. Wells also found that between 5 percent and 20 percent of the verbatim responses from copy tests by the Fouriezos and Ostberg organizations indicated consumers receiving the message that Dry Ban sprays on clear (CX 100), which many perceived as meaning without a residue.

Respondents' objection to the calculations of Dr. Wells on the ground that the verbatim responses *available* were used as the denominator in figuring the percentages listed by him, rather than the *total* consumers interviewed (see Wells, Tr. 1432-33, 1521-22), is not valid, in the opinion of the undersigned.

Persons contacted in copy research for various reasons do not always provide the interviewer with comments which can be recorded (Wells, Tr. 917; see generally Tr. 908-918). Use of the total number of persons contacted as the denominator in calculating the percentages of those who perceived the commercials as representing that Dry Ban went on dry, and was clear (without a residue), involves an assumption that none of the remaining consumers for whom no verbatims exist received those communications from the commercials. Such an assumption is completely unfounded in view of the evidence and the verbatims available.

45. The record establishes that a substantial portion of the viewing public equated "clear" and "clean" with a representation that Dry Ban left no visible residue after application (CX 60 (48 to 64)). Examples: "Ban leaves the lens clear and the other one makes the lens filmy" (CX 60 (50)); "They sprayed it on a glass to show it was clear. That it didn't leave a residue on your clothes" (CX 60 (50)); "Ban sprays on clear and doesn't leave a film. In an elevator, they sprayed Ban on a man's glasses to show it left no film" (CX 60 (52)). The research reports of Ogilvy & Mather also reported that members of the public often equated "clear" with "leaves no visible residue." Thus, in coding responses from those viewing "Glasses" and "Your Move," Ogilvy & Mather reported to Bristol-Myers that nine percent recalled the latter commercial as having "Showed Ban spraying on clearly, not filmy" (CX 60 (20)), and that nine percent of those seeing "Glasses" thought the main difference between the two anti-perspirants shown in the commercial was that Dry Ban "is clean, leaves no film, is clear" (CX 60 (21)). In fact, Ogilvy & Mather advised Bristol-Myers (CX 60 (7)):

> The most common visual mention for "Glasses" consisted of BAN spraying on clearly, not filmy (15%).

In the report on "Spokeswoman" Ogilvy & Mather advised Bristol-Myers that 31 percent of the viewers mentioned receiving the communication from the visual portion of the commercial "Ban spraying on clearly, not filmy" (CX 67(5)). In a similar report on "Showcase" (CX 71 (21)), Ogilvy & Mather advised that 20 percent of the viewers were able to "playback" the visual feature of the commercial "BAN spraying on clearly/not filmy" (CX 71 (6)).

Both Respondents Played an Active Role in The Development and Testing of the Challenged Commercials and Both Were Fully Informed and Knowledgeable with Respect to the Results Thereof

46. As prior findings demonstrate, Bristol-Myers and Ogilvy & Mather were responsible for the conception, creation, and development of the challenged commercials. Both respondents played a vital role, and were active participants throughout. In a letter to the Commission, mentioned earlier, the senior vice president of Ogilvy & Mather acknowledged that his agency took the basic concept and the representations in the foregoing commercials from respondent Bristol-Myers in the "earliest stages" and developed the finished commercials "in an effort to dramatize the Bristol-Myers supplied product difference" (CX 18).

The many research reports, communications with Bristol-Myers, and other documentation in evidence confirm the foregoing statement and show the complete involvement of Ogilvy & Mather, as well as Bristol-Myers, in the creation of the commercials, in the determination of their content, and in the broadcasting thereof over network and local television. The senior vice president of Ogilvy & Mather testified that the advertising strategy incorporated in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" was implemented by Ogilvy & Mather after analysis of the competitive situation, consumers perceptions, and differences between Dry Ban's formula and that of competing anti-perspirant sprays (Sowers, Tr. 1715-33). Ogilvy & Mather, as described earlier, tested the comparative demonstration (CX 23, 74, 75) ultimately utilized in the commercials, recommended its use after such tests, and produced the commercials incorporating it (Sowers, Tr. 1722-23, 1728, 1732-33, 1773-74, 1782; Mayers, Tr. 1232-33).

The extensive research conducted by Ogilvy & Mather in conjunction with respondent Bristol-Myers (Mayers, Tr. 1202; Sapirstein, Tr. 426, 469-74, 499, 536) utilizing the Schrader, Ostberg and Fouriezos organizations has been set out. Ogilvy & Mather planned and actively supervised such research (Schrader, Tr. 214-15, 238, 245, 263; Rosen, Tr. 321-22, 326; Ostberg, 20, 22, 28, 36-37). Through it Ogilvy & Mather thoroughly evaluated and analyzed the strategy of the comparative demonstration, the reaction of members of the public viewing the demonstration and the finished commercials utilizing it, the messages and representations communicated to such viewers by the finished commercials, and reported on all these aspects in complete detail to respondent Bristol-Myers as shown in prior findings (see CX 23-25, 27, 30, 56-57, 59-61, 65, 67, 69, 71, 74-76).

During the course of the development, testing and evaluation of "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," and the demonstrations in them, representatives and officials of respondent Bristol-Myers and respondent Ogilvy & Mather played active roles and were in continuous communication and consultation. Thus, John C. Horvitz, Product Manager for the Bristol-Myers Products Division, as previously described, on July 3, 1969, wrote to Tony Manlove, an account executive of Ogilvy & Mather (CX 90, 105), summarizing areas in which "our interest is high," and suggesting that Manlove interpret the summary as a "project list." Among the projects were the Dry Ban "test research" results, and "anything else we can do" to emphasize the story that "Ban goes on clean and dry" (CX 90). On Sept. 26, 1969, an Ogilvy & Mather project director (Tr. 444) transmitted the initial "communications test" results obtained by the Schrader organization on "Glasses" and "Your Move" to Guy Parker of the Bristol-Myers Research Department (Tr. 426). This letter which has already been referenced stated (CX 61):

> This morning I presented the results of our quick van test for Dry Ban to Jack Morgan and John Horvitz. Enclosed is a copy of the tabular data as it was given to them and a copy of the revised questionnaire that we used. Based upon this morning's meeting, it was decided to go national with "Glasses": 30 until we have the results of the on-air and R.E.A.P. tests.
>
> Both "Glasses" and "Your Move" will be on-air tested next Thursday, October 2nd (interviewing October 3rd) and R.E.A.P. tested - "Your Move" on October 3rd; "Glasses" the following week.
>
> Phyllis or I will be sending you further information on the research as it progresses.

"Phyllis" was Phyllis Sapirstein, a research group head of Ogilvy & Mather (Tr. 408). Jack Morgan was the Bristol-Myers Product Division vice-president (CX 105), and John Horvitz, as stated, was the Bristol-Myers Product Manager. Copies of the foregoing letter were sent to Dr. Edwin Berdy, the research director (marketing area) of Bristol-Myers (Tr. 449), Froni Biggard of the Bristol-Myers Research Department (Tr. 426), the Ogilvy & Mather Research Director (Tr. 449), and other agency personnel.

On Oct. 22, 1969, an official of Ogilvy & Mather wrote to Mr. R. Raskopf, Bristol-Myers Product Manager, giving a complete review of the status and results of "DRY BAN Copy Research" as of that date, including research on "Rusty," and informing him of additional copy research projects currently in progress which involved "on-air" testing of "Glasses" and "Your Move" and R.E.A.P. testing of these commercials (CX 23). Copies of this letter were sent to the Bristol-Myers "Group Product Manager" (CX 105), and various Ogilvy & Mather officials. On Oct. 31, 1969, an account executive of Ogilvy & Mather prepared a Conference Report of a meeting on Oct. 27, 1969, with Mr. Raskopf to discuss "BAN Copy Strategies and Future Creative Work." Among the "Agreements" reported were:

> The copy strategies for both DRY BAN and BAN Roll-On were felt to reflect accurately the creative direction which is most meaningful for the brands to take at this time (CX 24).

Agreement was also reported on Dry Ban "Current Strategy" and "Creative Development" including the "on-air" and "R.E.A.P." copy testing of "Glasses" and "Your Move" (CX 24). Copies of this report were also sent to top Ogilvy & Mather officials, including Robert S. Sowers, the management supervisor and later vice-president (Tr. 1715). Again, on Nov. 7, 1969, the same Ogilvy & Mather account executive wrote Bristol-Myers' Mr. Raskopf relating to "topline REAP test results for 'Glasses'," with copies to Mr. Sowers, and others of Ogilvy & Mather, and J. Weiner, Bristol-Myers Group Product Manager (CX 25).

On Dec. 23, 1969, another Conference Report by J. Dell 'Aquilo of Ogilvy & Mather was sent to Mr. Raskopf reporting a meeting on that date between top officials of Bristol-Myers and Ogilvy & Mather (CX 27). Present for Bristol-Myers were "Mr. F. Mayer, Mr. J. Morgan, Mr. J. Weiner, Mr. R. Raskopf." (The President of Bristol-Myers Products was Frank Mayers, (Tr. 1146-47; CX 105), the vice-president, as noted, was Jack Morgan (CX 105)). Objectives of this conference were:

> To present topline data from the R.E.A.P. and On-Air tests of the DRY BAN "Spokeswoman" commercial.
>
> In light of the research scores, to present the agency's recommendation for the posture of future DRY BAN advertising.
>
> To present four executions for approval.

Agreements were reached, as follows:

> II. AGREEMENTS
>
> Despite the high (25%) persuasion score of "Spokeswoman," it was agreed not to run this commercial on the air. The rationale behind this decision was:
>
> a. The low recall of major copy points. (8% for "Spokeswoman" vs. 15% for "Glasses")
>
> b. The relatively low brand recall score (27% for "Spokeswoman" vs. 34% for "Glasses")
>
> We will continue to run "Glasses," at least for the early part of 1970. We have also undertaken a R.E.A.P. test to determine the persuasion score of the commercial after three months on the air.
>
> We will produce, and put on the air "Jewelry Store" as a pool out to "Glasses." The two will run in even rotation.
>
> The agency will undertake the assignment of coming up with an execution capturing the "warmth," "Sincerety" [sic] and persuasiveness of "Spokeswoman," but adding to it the extra dimension of arousing interest.
>
> We will not produce "Motorcycle," "Board Meeting" or "Birdwatchers" at this time (CX 27).

On Feb. 5, 1970, Froni Biggard, previously mentioned as a member of the Research Department of Bristol-Myers, forwarded an internal memorandum to the Bristol-Myers Product Manager with copies to Bristol-Myers officials "E.M. Berdy, J.S. Morgan, G.S. Parker and J.D. Weiner" advising of the results of copy testing on "Spokeswoman" (CX 28). The memorandum reported:

> Attached are the agency's reports on the Dry Ban "Spokeswoman": 30 on-air and trailer commercial tests.
>
> To summarize the agency's conclusion, "Spokeswoman" is a better vehicle than "Glasses" or "Your Move" for communicating the demonstration message ("Ban is dry") as evidenced by the trailer test (forced exposure) results. However, "Spokeswoman" lacks the attention-getting power of the previously tested commercials in a "normal" viewing situation (on-air test) leading to a recommendation for revising the commercial to correct that deficiency.
>
> Our view of these test results minimizes the on-air scores for two reasons:
>
> 1. Testing was conducted only two weeks prior to Christmas when the respondents' attention to *any* commercial we might have tested would be at a low point. Thus, the lower recall scores for "Spokeswoman" than "Glasses" or "Your Move" is more a function of when the tests were conducted than of the actual pulling-power of the executions.
>
> 2. In addition, the tests are based on about 100 respondents making large differences in the scores (8-10 points) necessary to consider them statistically different. This

magnitude of difference between "Spokeswoman" and "Glasses" is for the most part lacking.

Therefore, we would conclude that "Spokeswoman" is not as deficient as the agency's analysis indicates.

If you feel that a meeting with agency to discuss these findings would be warranted, please let me know and I will set it up.

Copies of the actual Ogilvy & Mather research reports were provided to Messrs. Raskopf, Morgan and Weiner. On April 8, 1970, Mr. Costello, an Ogilvy & Mather account executive, transmitted to Mr. Raskopf additional "DRY BAN Test Scores" (CX 30).

In sum, Bristol-Myers and Ogilvy & Mather worked closely together, and conferred and communicated regularly and frequently concerning the challenged commercials and the testing thereof. The reports and communications described earlier herein, and others, discussing and analyzing the results of such consumer research (copy tests) were regularly prepared by Ogilvy & Mather for Bristol-Myers and were plainly transmitted to that firm as a matter of routine practice. The undersigned finds that respondent Bristol-Myers was an active participant in, and was fully knowledgeable, aware, and informed of, all the testing and evaluation of the challenged commercials and the demonstrations incorporated in them, of similar commercials never actually broadcast commercially, and of the reports of consumer reactions to all the foregoing. Contentions to the contrary are rejected.

The Consumer Research of Respondents Constitutes Reliable, Probative and Substantial Evidence of the Representations Communicated to the Public by the Challenged Commercials

47. The consumer research conducted by respondent Ogilvy & Mather in conjunction and consultation with respondent Bristol-Myers, and utilizing the Schrader, Ostberg and Fouriezos organizations, constitutes reliable, probative and substantial evidence of the messages and representations conveyed, directly and by implication, by the commercials "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," to members of the public viewing them. The Schrader organization has been evaluating television commercials and print advertising for over 20 years, and such evaluation involving the designing of surveys, the preparation of questionnaires, the conducting of consumer interviews, and the construction of reports constituted the bulk of that firm's work (Schrader, Tr. 211-16). Ogilvy & Mather has been a client since the Schrader organization was founded, and other clients over the years have included major U.S. corporations (Schrader, Tr. 213). Through Ogilvy & Mather and other agencies, the Schrader organization in the past has done substantial work on various Bristol-Myers products. Like the Schrader organization, H.D. Ostberg &

Associates is well-known in the advertising industry, and for a number of years has performed advertising research for many agencies and corporate clients including respondents Bristol-Myers and Ogilvy & Mather (Ostberg, Tr. 10-14). N.T. Fouriezos & Associates, as well as its parent organizations, has likewise been doing consumer surveys and market research for many years (Rosen, Tr. 309-12). Respondent Bristol-Myers has been a continuous client, as has Ogilvy & Mather (Rosen, Tr. 313). The consumer surveys and tests conducted by the Schrader, Ostberg and Fouriezos organizations, sometimes referred to in the advertising industry as "copy tests," were not different from the type routinely utilized in the advertising industry, and by respondents, to obtain information and data on which to base advertising and marketing decisions. Indeed, such was the very purpose here. None of the research was conducted with litigation in view or for any other purpose which might interject a bias. All appear to have been objective and were conducted simply to evaluate the efficacy of the commercials long prior to any question of challenge to them, or to the demonstrations in them of "clean, clear" Dry Ban versus the "oily, opaque" and "creamy" competitive brand.

In conducting copy research for respondents, as earlier described, the Schrader, Ostberg and Fouriezos organizations each utilized somewhat different techniques. The Schrader firm exhibited the Dry Ban commercials or the Dry Ban demonstrations in mobile vans parked in shopping centers to volunteers obtained there, and questioned such persons about their perceptions immediately after the viewing (CX 61; Tr. 251). The Ostberg research (REAP tests) used the same mobile van system, but contacted the viewers about their perceptions by telephone the next day (CX 47, 50, and 63; Tr. 36-41; the analysis of this work by respondent Ogilvy & Mather may be found in CX 57 and 60). The Fouriezos organization inserted the commercial to be tested into an actual television broadcast in selected metropolitan areas, and then telephoned persons the next day on a random basis to determine their perceptions (CX 45, 58; Tr. 321-22; the Ogilvy & Mather analysis may be found in CX 56 and 59). The Fouriezos technique is known as "on-air" testing. Since questioning occurred immediately, the Schrader procedure did not measure the degree to which the commercial and its messages would be remembered by viewers after a time lapse, although it may have been somewhat more efficient than the Ostberg and Fouriezos techniques in picking up communications transmitted. On the other hand, the latter procedures had a greater ability to determine how well the commercials being tested and their messages were recalled, and the Fouriezos tests additionally provided some measure of the effectiveness of the commercial to command attention in the context of normal television viewing, and the distractions of the home or place where viewing took place. See generally with respect to these different techniques, Schrader, Tr. 253, Wells, Tr. 885-901. All three systems, however, were relatively effective in determining the messages and representations communicated to viewers by the commercials being tested, although there is evidence, as indicated, that the Schrader procedure with immediate questioning is superior in this respect (Wells, Tr. 901).

The tests herein conducted by the Schrader organization were personally supervised by the president, Donald P. Schrader, and the interviews were tape recorded utilizing questions familiar to and long used by Ogilvy & Mather (Schrader, Tr. 217-19, 230-36, 242-43, 245-263). The responses of the persons interviewed were compared with the tape recorded answers. The answers and tapes were transmitted to respondent Ogilvy & Mather (Schrader, Tr. 258-263, 273) and, as described, were included in reports furnished to respondent Bristol-Myers. Validation checks, later discussed, were not always considered necessary in view of the person-to-person aspect of these interviews, and the use of tape recording, although in some instances telephone validation was accomplished (Schrader, Tr. 257-58). The questions propounded were considered carefully to eliminate bias (Schrader, Tr. 260-61).

The Ostberg organization was also a veteran in the advertising industry. The questionnaire format utilized for the van tests conducted by the Ostberg organization in shopping centers in the metropolitan centers of Philadelphia, Chicago, and Los Angeles was developed by representatives of various major advertising agencies including respondent Ogilvy & Mather, and the research department of respondent Bristol-Myers (Ostberg, Tr. 20-22). Dr. Ostberg did not believe the questions used for the interviews contained any undue bias (Ostberg, Tr. 23-26). The mobile van technique and the consumer sampling method used in the Ostberg surveys were specifically desired by representatives of respondent Bristol-Myers (Ostberg, Tr. 144; see also Tr. 28, and Sapirstein, Tr. 653) who, with personnel of respondent Ogilvy & Mather, were considered by Dr. Ostberg to be highly knowledgeable in the area of consumer testing (Ostberg, Tr. 189-91). Representatives of both respondent Bristol-Myers and respondent Ogilvy & Mather participated in planning the surveys (Ostberg, Tr. 190-91), and representatives of the latter went out "in the field" periodically to check on the work (Ostberg, Tr. 184). Interviewers who conducted the telephone contacts with members of the public were carefully selected and trained, and were required to sign a certificate that the information they recorded from the persons contacted was accurate and that they would so testify under oath (Ostberg, Tr. 184-86; for the interviewer certificate see OMRX 3(48)). "Validation" checks were conducted by Dr. Ostberg's organization as a matter of standard procedure on a substantial percentage of the members of the public interviewed in copy tests similar to those employed on the Dry Ban commercials (Ostberg, Tr. 34, 197). This involved recontacting the persons questioned by the interviewers over the telephone and verifying the answers previously given (Ostberg, Tr. 97-99). Although Dr. Ostberg could not recall specifically whether the standard procedure of "validation" was performed with respect to the tests his organization conducted on the Dry Ban commercials here involved, there is nothing in this record to indicate that his firm's standard procedure of validation was not followed. Indeed, Dr. Ostberg testified "I would say that if there was no validation, I would be aware of it" (Ostberg, Tr. 189). Ogilvy & Mather, furthermore, insisted that firms doing consumer research for it conduct validation checks (Sapirstein, Tr. 618). When the questionnaires were received from the interviewers in the field, personnel in the offices of the Ostberg organization in New York checked and coded the responses (Ostberg, Tr. 36-37, 200). "Coding" involves grouping the responses of the members of the public interviewed under certain headings expressing a common theme and the objectives of the study (Ostberg, Tr. 168; Rosen, Tr. 344, 375-76). The codes utilized for the Dry Ban surveys conducted by the Ostberg organization were approved by Ogilvy & Mather (Ostberg, Tr. 37, 186). All responses of the members of the public interviewed were grouped under appropriate codes, tabulated and transmitted to Ogilvy & Mather and Bristol-Myers (Ostberg, Tr. 37, 45, and 54).

The Fouriezos organization, like both the Schrader and Ostberg organizations, was highly experienced in performing consumer and market research. In conducting the "on-air" surveys (CX 45, 58), the procedures set out by Ogilvy & Mather were followed (Rosen, Tr. 320). The selection of those interviewed, as noted, was on a random basis, and the questionnaire used was prepared by Ogilvy & Mather whose involvement in the work, according to an official of Fouriezos, was unusually high (Rosen, Tr. 321-26). The interviewers were told to record the answers given by those who had seen the Dry Ban commercials in the words actually used, and validation was performed on a substantial number of those interviewed (Rosen, Tr. 327, 300). As in the case of the Ostberg tests, the answers of the persons interviewed were grouped in codes approved by Ogilvy & Mather (Rosen, Tr. 322, 326, 332; Sapirstein, Tr. 661), and an effort was made to make the codes used as representative of the actual or verbatim responses as possible (Rosen, Tr. 343-44). The verbatim responses of the persons interviewed were submitted to Ogilvy & Mather and transmitted by that firm to respondent Bristol-Myers with only grammatical editing (Sapirstein, Tr. 510-11).

The cost of the surveys by the Schrader, Ostberg and Fouriezos organizations was substantial (see, *e.g.*, Ostberg, Tr. 192-94; Rosen, Tr. 366). In sum, the consumer surveys and tests by the Schrader, Ostberg and Fouriezos organizations were performed in accordance with the standards prevailing in the advertising industry. The results are valid evidence of the messages, communications, and impressions conveyed by the challenged commercials. Although the methodology utilized was not of the type permitting projection to the entire population viewing the Dry Ban commercials, the results are clearly projectable to a substantial proportion of that population.

The Consumer Research of Respondents Established that the Challenged Commercials Communicated to a Substantial Portion of Viewers the Representations that Dry Ban Was Dry and Not Wet when Applied to the Body and Left No Visible Residue

48. The demonstrations in "Rusty" and "Your Move" are the same, as described earlier, and identical to the demonstrations in "Show-Up," "Dry Manhattan," and "Spotty Performance." The demonstration in "Glasses" is essentially similar. The consumer research and surveys conducted by respondents utilizing the Schrader, Ostberg, and Fouriezos organizations, set out in prior findings, establish that a substantial portion of the public viewing "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," understood those commercials to convey the representations that Dry Ban was a dry spray that was not wet when applied to the body, that it left no visible residue when applied to the body, and that, because of those physical characteristics, Dry Ban was superior to competing anti-perspirant sprays.

Respondents Knew or Should Have Known from Their Consumer Research that the Challenged Commercials Had the Capacity to Convey and Conveyed the Foregoing Representations

49. Bristol-Myers and Ogilvy & Mather knew or should have known from the nature and content of "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," that those commercials had the tendency and capacity to convey to members of the public viewing them the representations that Dry Ban was dry and not wet when applied to the body, and left no visible residue on application to the body. Aside from the nature and content of the commercials them-

selves, the consumer research conducted by respondent Ogilvy & Mather in conjunction and consultation with respondent Bristol-Myers, and utilizing the Schrader, Ostberg and Fouriezos organizations, set out in detail and discussed hitherto, provided both respondents with information that the Dry Ban commercials, and the demonstrations contained in them, had the tendency and capacity to communicate, and communicated, the foregoing representations to members of the public viewing them.

When Respondents Broadcast the Challenged Commercials, They Knew or Should Have Known the Representations Those Commercials Had the Capacity to Convey and Conveyed

50. Respondents Bristol-Myers and Ogilvy & Mather broadcast one or another of "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" over network and spot television to the nation's public from July 1969 through Sept. 1970 even though they had reliable and substantial evidence in their possession, and knew, or should have known, that the foregoing commercials had the tendency and capacity to represent, and represented to a substantial portion of the viewing public, that Dry Ban was a dry spray and not wet when applied to the body, that it left no visible residue, and that it was superior to competing spray anti-perspirants because of those characteristics.

Dry Ban in Fact Is not a Dry Spray but Is Wet when Applied to the Body and after Application Dries Leaving a Visible Residue

51. Dry Ban is a liquid and is wet when sprayed on the body. The formula for Dry Ban consists of 37 percent "Alcohol, SD40-B Anhydrous" 55 percent liquid propellent, and certain other ingredients (CX 12). Dry Ban in the can is a liquid (Tr. 1077-78). When Dry Ban is sprayed from the can the substance emitted is a liquid spray and is wet. As Bristol-Myers senior research engineer testified (Weinstein, Tr. 1077-78):

> Q. * * * you are stating, then, that Dry Ban is a liquid when it is in the can?
> A. That's correct.
> Q. And it is wet?
> A. Well, it's a liquid; yes.
> Q. Okay. And then when it comes in contact with the vapor coming out of the spray nozzle, it may become drier but it's still wet; isn't that correct?
> A. Well, you have liquid particles which tend to be broken up, create a mist.
> Q. But they are still liquid particles?
> A. Yes.
> Q. And they are still wet?
> A. Well, they are liquid; yes.

A can of Dry Ban is in the record as Commission Physical Exhibit 6. In a demonstration during the hearings in this case, the foregoing can of Dry Ban was used to spray on a piece of flat glass, and on the forearm of a person. The transcript reflects not only the fact that Dry Ban was obviously wet and runny, but *looked* wet and runny, in fact, like water (Tr. 845-46). Although the manner of holding the can, *e.g.*, horizontal or vertical or some variation of either, and the position of the "dip tube" within the can, may affect to some extent the composition of the spray emitted (Weinstein, Tr. 1057-1074; BMRX 11 (1) (2)), in any case the spray is wet. The answer of Bristol-Myers, by admitting that Dry Ban "dries out" after application to the body in effect concedes that on application it is wet. See also OMRX 2, and Sowers, Tr. 1861 and 1736 R.

52. A videotape showing the spraying of Dry Ban on flat glass and the forearm of a person, and the results thereafter continuously over a five (5) minute period (Tr. 790-96), was introduced into the record by complaint counsel (CX (Physical Exhibit) 8). Contrary to the demonstrations in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," this *uncut* and *continuous* portrayal clearly reveals to the viewer the wet, runny, liquid, and watery nature of Dry Ban when sprayed on the body or on a surface, as well as the plain and obvious residue deposited on the body or on a surface by such spraying. The residue left after spraying consists of the solid ingredients suspended in the liquid in the can (Sandland, Tr. 1678, 1701-09). In sum, Dry Ban is wet and watery when applied to the body and remains wet for several minutes before drying, and upon drying leaves a substantial and visible residue.

Ogilvy & Mather Knew or Should Have Known that Dry Ban Was Wet when Applied to the Body and on Drying Left a Visible Residue

53. Ogilvy & Mather knew or should have known that Dry Ban was not a dry spray but was wet when applied to the body, and left a visible residue after application. As a matter of agency procedure, Ogilvy & Mather fully informed itself about the characteristics of products being handled and did so with Dry Ban (Sowers, Tr. 1720). Simple examination and spraying of Dry Ban reveals it to be a wet and watery spray which leaves a visible and obvious residue after spraying (see Sowers, Tr. 1736, 1774-75, 1861, 1863).

The Representations Were Characteristics Material To Promotion And Sale of Dry Ban

54. The representations of dryness of application and lack of residue were important, desirable and material in the marketing and sale of Dry Ban. The many consumer surveys and copy tests, most of which have been discussed in one particular or another earlier herein,

attest to the materiality of these characteristics to members of the consuming public, as do the verbatim responses attached to the reports of these tests. See also "A Consumer Survey on Deodorants and Anti-Perspirants" (CX 85).

DISCUSSION

A viewing of "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," is convincing that they possessed the tendency and capacity to represent, and represented, directly and by what was implied, that Dry Ban was dry, went on dry (like a powder), and left no discernible or visible residue on the body. The undersigned has specifically so found based on the viewing of the commercials themselves.

The authority of the Commission to draw its own inferences from challenged advertisements has been sanctioned repeatedly over the years. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F.2d 523, 528 (5th Cir. 1963); *Merck & Co.* v. *Federal Trade Commission*, 392 F.2d 921, 925 (6th Cir. 1968); *Kalwajtys* v. *Federal Trade Commission*, 237 F.2d 654, 656 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025; *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *E.F. Drew & Co.* v. *Federal Trade Commission*, 235 F.2d 735, 741 (2d Cir. 1956), *cert. denied*, 352 U.S. 969.

The principle was reiterated recently in *Firestone*, order of Sept. 22, 1972 [81 F.T.C. 398, 454], CCH Trade Reg, Rep., 1970-73 Transfer Binder, ¶20,112. The Commission there stated:

> * * *The law is clear that the Commission's expertise is sufficient and that it need not resort to survey evidence or consumer testimony as to how an advertisement may be perceived by the public or whether they relied upon the ad to their dertriment.* * *

Respondents do not contest this principle, but argue that the Commission cannot draw unreasonable or "outlandish" inferences, citing *Kirchner*, 63 F.T.C. 1282, 1290 (1963). There a swimming-aid device was represented, among other things, as being "invisible." The Commission dismissed this allegation commenting that a representation did not become false and misleading because it might be "unreasonably misunderstood" by an "insignificant and unrepresentative" segment of the class of persons to whom it was addressed. In the opinion of the undersigned, there is no parallel whatever between the hyperbole involved in calling waterwings "invisible," and the conclusion that significant segments of the public would or might seriously perceive respondents' commercials to represent that Dry Ban was dry, went on dry and left no visible residue on the body. There is nothing far-fetched, outlandish or unreasonable in deriving those impressions from "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," as respondents' own empirical evidence verified. Respondents' argument that the advertisements only communicated "that Dry Ban was a clear, clean product" and an alternative to the "opaque and oily" competitive product (memorandum of Bristol-Myers, pp. 8-37) is rejected. True, this communication may have been in the commercials, but the commercials had the capacity to convey several representations to the public. Such is often the case as the Commission recognized in *Firestone*. Advertisements which are capable of two or more meanings, one of which is deceptive, are false and misleading. *Rhodes Pharmacal Co.* v. *Federal Trade Commission*, 208 F.2d 382, 387 (7th Cir. 953), modified by reinstating Commission's order, 348 U.S. 940; *Giant Food, Inc.* v. *Federal Trade Commission*, 322 F.2d 977, 981 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964). Such advertisements are construed against the advertiser. *Murray Space Shoe Corporation* v. *Federal Trade Commission*, 304 F.2d 270 (2d Cir. 1962); *United States* v. *95 Barrels of Vinegar*, 265 U.S. 438, 443 (1924). There is no question whatever, based on the commercials themselves, that they had the tendency and capacity to convey, and conveyed, the representations alleged in the complaint. A tendency and capacity to deceive, of course, are all that is necessary for a violation. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F.2d 676, 680 (2d Cir. 1944); *U.S. Retail Credit Ass'n.* v. *Federal Trade Commission*, 300 F.2d 212, 221 (4th Cir. 1962). The representations are so plainly in the commercials that there is little need to invoke an additional principle applicable to their interpretation, i.e., that in deciding whether advertisements are or may be deceptive the Commission must look to the gullible and credulous rather than to the cautious and knowledgeable. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, *supra; Exposition Press, Inc.* v. *Federal Trade Commission*, *supra*.

As the findings set out hitherto disclose, however, it is not necessary to rest upon an examination of the commercials themselves. Contemporaneous consumer surveys and research conducted at the instance of respondents themselves, already reviewed in detail, reveal that "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" in fact communicated the representations alleged. Respondents, however, object to consideration of these research reports in deciding this proceeding (memorandum of Bristol-Myers, pp. 48-72; of Ogilvy & Mather, pp. 6-10). Bristol-Myers contends that the reports do not establish the "meaning alleged," that the persons interviewed and the design of the studies made them non-representative, that the reports lacked any foundation proving trustworthiness, and that they do not meet the established legal standard for probative evidence. Ogilvy & Mather contends that the surveys "fall far short of the legal requirements for their admission as to the truth of their contents."

In the opinion of the undersigned these contentions lack substance. The research reports are respondents' own contemporaneous records. Respondents prepared "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" and evaluated them by determining consumer reaction on seeing them. As set out in prior findings, reputable, long established research organizations well-known in the advertising industry were engaged to conduct the surveys. They were supervised closely by Ogilvy & Mather, and the results were analyzed and organized by that firm's research department. As extensive earlier discussion reveals, there was constant communication and consultation relating to the research between Ogilvy & Mather and Bristol-Myers during the conduct thereof which extended over a substantial period of time. The research was of a type routinely utilized in the advertising industry to evaluate advertising contemplated or in use. Respondent Bristol-Myers not only was completely familiar with the techniques employed, but took an active role in planning and supervising the entire project.

Respondents themselves plainly regarded the consumer surveys as accurate and reliable for charting business courses. Indeed, the so-called REAP (Ostberg) tests were developed by respondent Ogilvy & Mather (Sapirstein, Tr. 653), and Bristol-Myers "felt very strongly" that the "forced exposure" mobile van technique should be used (Ostberg, Tr. 144). See also Schrader, Tr. 231, 249. And respondents relied on the research as the record discloses. The letter earlier quoted (see prior proposed finding 46) from Ogilvy & Mather to Bristol-Myers (CX 61) reporting on the Schrader "van" tests of Glasses" and "Your Move" stated that based on "this morning's meeting," which discussed the foregoing tests, "it was decided to go national with 'Glasses':30 until we have the results of the on-air and R.E.A.P. tests." In the research report of Dec. 5, 1969, Ogilvy & Mather advised Bristol-Myers of the results of REAP testing of "Glasses" and "Your Move":

> * * * "Glasses" is the most effective commercial compared to "Rusty" and "Your Move." Not only is "Glasses" a powerful execution in terms of persuasion but it also communicates the new BAN strategy - "Ban is dry" (CX 60(9)).

Broadcasting of "Rusty" was terminated on December 24, 1969, "Your Move" was never utilized (CX 81, 82), and "Glasses" was broadcast for nine months thereafter until Sept. 11, 1970.

The fact that the surveys were not conducted with the precision of a scientific experiment, and are not properly projectable to the entire population of the nation does not render them inadmissible and unusable. Examination of the research reports and the testimony surrounding them confirms their reliability. Hundreds of consumers were interviewed in a variety of shopping centers and over the telephone in diverse geographic areas. In only five research reports evaluating "Rusty," "Glasses," and "Your Move," over 700 persons were interviewed (CX 56-61). These are not insignificant numbers. Although the persons interviewed were possibly not completely representative of the total television audience, they were clearly representative of very large segments of that audience. Certainly the results are not limited to the persons interviewed, and can be projected to a substantial portion of the viewing public. That is all that is necessary for purposes of this proceeding. The fact that none of the members of the public who were interviewed, and none of the interviewers were called as witnesses, does not disqualify the research reports from consideration or connote a failure to establish trustworthiness (memorandum of Bristol-Myers, pp. 63-64). Again, these were respondents' own studies and nothing indicates unreliability. Indeed, the circumstantial guarantees of trustworthiness are of a high order, contrary to respondents' contentions. The very magnitude of the research, performed in the absence of any factors tending to tilt the results one way or another, is in itself convincing of the reliability of the surveys, aside from other considerations mentioned herein. Hundreds of "verbatims" are involved eliminating the significance of conceivable inaccuracies in reporting individual "verbatim" comments.

The research reports are not unreliable because the techniques used, particularly in the so-called "forced exposure" (mobile van tests), did not reflect true television viewing in the home or elsewhere. In making this argument respondents suggest that the communications received from van tests are not necessarily those obtained from the challenged commercials under "real life" conditions. The fact that the mobile van "forced exposure" technique is artificial in many respects does not invalidate the results insofar as the communication of ideas is concerned. Indeed, there is expert testimony that the "forced exposure" technique with immediate questioning, as in CX 61, is the best procedure to determine the ideas communicated by a commercial (Wells, Tr. 918). If the demonstrations in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," or "Glasses," upon being shown in a mobile van, communicated to a substantial portion of viewers that Dry Ban was dry and not wet, and left no visible residue on the body, those commercials had the tendency and capacity to communicate those representations when broadcast over commercial television. There may, of course, be fewer distractions in the mobile van, and the commercial is not imbedded in a continuous broadcast of programs and other advertising. But these factors would only bear on the attention viewers might give respondents' commercials, not on the ability of the commercials to communicate ideas in one setting but not in another. In short, if a commercial can communicate an idea in a mobile van showing, it can communicate that idea over network television. The results obtained in the mobile van tests, moreover, were confirmed by so-called "on-air" tests (see prior finding 39) where one of the challenged commercials, or a commercial containing the same demonstration, was incorporated into a program actually being broadcast (see, *e.g.*, CX 59). In sum, the research reports are trustworthy and constitute reliable, probative, and substantial evidence as hitherto found.

Complaint counsel seek a finding that respondents "specifically intended" to convey the representations to the public that Dry Ban was a dry spray, was not wet when applied to the body, and on application left no visible residue. Intent, of course, is not necessary for a violation. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 79-80 (1934); *Gimbel Bros., Inc.* v. *Federal Trade Commission*, 116 F.2d 578 (2d Cir. 1941); *Montgomery Ward & Co., Inc.* v. *Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967). A specific intent to convey the representations, however, would be material in at least two respects. First, it would bear on the interpretations to be placed on the commercials themselves and, second, such an intent might be a factor as to the "fencing in" required in any cease and desist order issued.

Contemporary documentation relating to intent is subject to conflicting interpretations. Although, as already described, there are items which speak of communicating the "Ban is dry" strategy, there are other items indicating a purpose to communicate the "clear, clean" representation in contrast to the "oily, opaque" competitive product. Ogilvy & Mather's "Ban Deodorant 1970 Marketing Plan" states (CX 86(2)):

> The DRY BAN creative strategy will assume a competitive stance against other leading anti-perspirant sprays. Persuasive, new "reason why" copy will be used to convince potential customers that DRY BAN is a superior aerosol anti-perspirant (continuing to exploit the characteristics of the clear, quick drying formula).

This Marketing Plan further noted, in reviewing 1969 marketing efforts, that the original advertising strategy adopted for Dry Ban which "positioned the Brand competitively against deodorant aerosols" had been subject to a "major change" which had been "implemented in mid-year" (CX 86(5-6)). The new strategy was incorporated in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," and involved (CX 86(6)):

> * * *the visual demonstration of the difference between Dry Ban's "clear, clean" application appearance and the competition's "oily, opaque" appearance.

In carrying out the new strategy, it was planned that Dry Ban television copy would focus on the "non-oily demonstration" (CX

86(11)). A Nov. 1969 letter from Ogilvy & Mather to Bristol-Myers relating to "Top Line R.E.A.P. Test Results for Glasses" noted that the commercial was extremely successful in "persuading customers that the clear, clean story is meaningful" (CX 25).

A number of statements in the research studies are similar. In Aug. 1969, Ogilvy & Mather in submitting the results of a R.E.A.P. test to Bristol-Myers on "Rusty" reviewed the concept behind the commercial in an "Introduction" to the study. Ogilvy & Mather stated (CX 56 (3)):

> "Rusty":30 is the first commercial produced for BAN which is unique in utilizing a combination *demonstration* and "questions" format approach to additionally communicate that BAN goes on clear while other deodorants go on "greasy." This new strategy was created with the realization (resulting from previous research) that consumers have a definite preference for a deodorant which is non-oily.
>
> A day-after-recall test of this new :30 commercial was conducted in order to ascertain primarily whether viewers did in fact notice the visual demonstration aspect of the commercial showing the added non-oily benefit when using Dry BAN deodorant. The test was conducted on the July 22nd telecast of the *Doris Day Show* in Kansas City, Denver and Hartford (emphasis in original).

Under "Conclusions" Ogilvy & Mather remarked to Bristol-Myers that "Rusty" did poorly in "its primary objective, namely the communication of the visual 'greasy' demonstration" (CX 56 (5)). In Sept. 1969 Ogilvy & Mather reported to Bristol-Myers on another R.E.A.P. test of "Rusty" in which it was stated that the initial advertising strategy for Dry Ban, after it was introduced in 1968, was to "communicate Dry BAN's ability to stop perspiration wetness as well as odor," and that "Rusty" was the first commercial designed (CX 57 (2)):

> * * * to communicate that BAN goes on clear while other anti-perspirants go on "greasy."

Ogilvy & Mather noted that:

> This new strategy was created with the realization (based on previous research) that consumers have a definite preference for an anti-perspirant that is non-greasy and that this "demonstration" is effective in communicating BAN's superiority in this area.

In Mar. 1970 Ogilvy & Mather again noted (CX 71 (3)):

> "Glasses" :30, "Your Move" :30 and "Spokeswoman" :30 were the first three DRY BAN "Demonstration" commercials which did not employ the "Questions" format. The primary objective of these executions was to communicate that BAN goes on clean and clear, while other anti-perspirant deodorants go on with an oily/opaque appearance. After R.E.A.P. and On-Air testing the commercials, it was decided to run "Glasses."
>
> "Showcase" :30 is a pool-out of the "Glasses" execution for DRY BAN. In this commercial a young couple in a jewelry store compare DRY BAN to another anti-perspirant on the glass counter, illustrating that DRY BAN goes on clean and clear while the other anti-perspirant deodorant has an oily/opaque appearance when applied.

Pilot studies as early as Apr. 1969, and well prior to the preparation and broadcasting of any of the challenged commercials (CX 82), also contained statements indicating the purpose of the commercials was to communicate to the consumer in a graphic way the clear appearance of Dry Ban in contrast to the "white and creamy" look of the competitive brand (CX 75). A demonstration very similar to the one incorporated in the challenged commercials was utilized (CX 75 (24)). There are no statements indicating that the purpose of the demonstration was to represent that Dry Ban went on dry (like powder) and left no discernible or visible residue, or an attempt to find out if that message was in truth communicated. Ogilvy & Mather reported to Bristol-Myers the conclusion that (CX 75 (4)):

> The demonstration communicates a product plus for Ban Anti-perspirant over Arrid Extra Dry in terms of Ban being perceived as clearer and less greasy, which is translated by consumers into important benefits (non-staining, not sticky, etc.). The demonstration should prove effective in advertising.

The questionnaire utilized in this "Communication Test of the Dry Ban 'Greasy' Demonstration" (CX 75 (17-22)) fails to indicate any interest in ascertaining whether the demonstration conveyed the message that Dry Ban went on dry, and left no residue (see particularly CX 75 (21)). If respondents intended to convey these representations, one would have thought that they would have been looking to see whether the demonstration in fact communicated them.

A pilot study in June 1969 "A Test of the 'Greasy' Demonstration-Dry Ban and Clear and Dry" reported that a demonstration of Dry Ban's "clear formula" versus the "creamy formula" of the leading competitive brand was highly effective in creating a "preference for the clear formula" (CX 74 (2)). Bristol-Myers was advised that the results showed that housewives "overwhelmingly selected the clear formula over the greasy formula in the demonstration." About a year later in June 1970 Ogilvy & Mather reported to Bristol-Myers (O&MRX 3 (3)):

> Recent advertising for DRY BAN has emphasized the fact that the product sprays on clear. The currently aired commercial execution of this strategy, "Glasses" :30, features a demonstration of DRY BAN spraying on clear while another deodorant goes on with an oily/opaque appearance.
>
> A new strategy developed for DRY BAN shifts the emphasis to the product's quick drying property. One commercial execution of this strategy is a 60-second commercial entitled "Slow Burn." The commercial features a man eating breakfast with his arms extended because his deodorant would not dry. The demonstration segment of the commercial shows BAN and another anti-perspirant being sprayed on the back of a man's hand. Time lapse photography shows how BAN is dry in three minutes while the other anti-perspirant is still wet one half-hour later.

In contrast to the foregoing, however, complaint counsel point to documentation examples of which have been quoted earlier, where respondents have made reference to an advertising strategy to communicate "Ban is dry" (see, *e.g.*, CX 59(3), 60(3), 65(3), 67(3), 69(3), 90(1)). Complaint counsel also point to the fact that, as found herein, respondents' research studies clearly revealed that a substantial segment of consumers who viewed the challenged commercials derived the message that Dry Ban went on dry, and left no residue, yet respondents continued to broadcast one or more of the commercials.

In resolving what appear to be conflicting indications from contemporaneous documents, several considerations are germane. If respondents had a specific intent to misrepresent Dry Ban as dry and non-wet, it seems probable that the leading spray would have been shown to be wetter and runnier than it was. Furthermore, the questions used to elicit reactions of members of the public to the commercials were "open-ended," that is, they were general, allowing members of the public to extemporize their understanding of the commercial (Ostberg, Tr. 105; Wells, Tr. 922-25). Example: What ideas about BAN were brought out in the commercial? The questions plainly did not indicate a search to discover whether the person interviewed received the message that Dry Ban went on dry, left no residue, etc. (see, *e.g.*, CX 45 (17-18), CX 47(38-39), CX 56(29), CX 58(21), CX 59(25), CX 60(37-38, 46), CX 61(12-14)). Again, if there had been a specific intention to communicate the foregoing representations, one would have thought that respondents would have specifically sought to determine the effectiveness of the commercials in that respect.

Statements in contemporaneous documentation that the advertising purpose of "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," was to "communicate the BAN is dry strategy" (*e.g.*, CX 59(3)), in the opinion of the undersigned, reveal negligence, carelessness, and lack of judgment in use of the word "dry" rather than a specific and calculated intent to mislead. For example, the "codes" (see Ostberg, Tr. 105-140) used to organize the interviews of consumers who saw one or another of the challenged commercials in mobile vans or "on-air," and to group the messages and communications they received from such commercials, incorporated a number of different and sometimes incompatible ideas under the concept "dry" (CX 59 (13, 15, 16), CX 60(18, 21)). Thus, under "Ban is Dry (Net)" in Table 3 of the report to Bristol-Myers on the consumer testing of "Glasses" and "Your Move" appear, among other communications, "Protects Clothes" and "Doesn't smear/isn't sticky, messy" (CX 59(13)). Similarly, in an evaluation of "Spokeswoman," the Ostberg organization under "Ban is Drier (Net)" grouped the communications "Ban is clean, leaves no film, is clean," "Ban is not sticky, messy," "Ban does not run, is not watery," "Ban dries faster," as well as "Sprays on dry, goes on dry" and "Ban is drier (general), dry Ban" (CX 66(12)).

Inasmuch as "codes" are developed in conducting surveys of consumers to determine the effectiveness of advertisements and are based on the objectives of the advertising (Ostberg, Tr. 106-08, 168-69), a specific and calculated intention on the part of respondents to convey to the public that Dry Ban went on dry and left no residue is not clearly apparent. Accordingly, the undersigned, in weighting these various indications and items of evidence, concludes that respondents in disseminating "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," did not possess a *specific intent* to represent that "Dry Ban is superior to competing anti-perspirant sprays because it is a dry spray that is not wet when applied to the body and because it leaves no visible residue when applied to the body."

As previously found, however, there is no question that the commercials in fact had the tendency and capacity to make, and made, those representations.

Moreover, from the consumer research conducted by them, as found, respondents knew, or should have known, that a substantial portion of the viewing public interpreted the challenged commercials as conveying those representations. The many "verbatim" responses quoted earlier herein, and the great number in the record are very clear in this respect. The comment of Dr. Wells on this aspect is telling:

> If I saw this kind of result coming up in a copy test, I would be immediately alerted to the possibility that the consumer was getting a message which I did not intend to project, if indeed I did not intend to project the message that the product sprays on dry (Tr. 1404).

If respondents did not know from the consumer research studies that the challenged advertisements were conveying the questioned representations to the public, they should have known that fact. The research reports not only summarized the ideas communicated by the commercials to the members of the public who received them, and who were interviewed, but contained the "verbatim" comments of members of the public surveyed (CX 59(18-22), CX 60(48-67), CX 67(23-35)).

Complaint counsel, as noted, point out that respondents continued the dissemination of the commercials even though the consumer research demonstrated that they were communicating false, misleading and deceptive representations as to the physical characteristics and product features of Dry Ban. Complaint counsel contend that this circumstance establishes a specific intent to mislead. Although this is an argument of some cogency, the undersigned is not prepared to go that far, but rests on this issue with the finding that respondents knew or should have known that the challenged commercials had the tendency and capacity to mislead and deceive, and misled and deceived, a substantial portion of the viewing public. Negligence, carelessness, or lack of judgment, or even culpable lack of concern in the use of words and in the interpretation of the research, however reprehensible, is not the equivalent of a calculated, specific intent to mislead.

Ogilvy & Mather argue that the advertising has been terminated and no order is required (Answer and Memorandum, p. 4). Cessation of the practices, of course, does not mean that no order is necessary, because the Commission is responsible not only for ending unlawful activities, but for ensuring that they will not be resumed in other forms or with respect to other products. *Federal Trade Commission* v. *Ruberoid*, 343 U.S. 470 (1952); *Spencer Gifts, Inc.* v. *Federal Trade Commission*, 302 F.2d 267 (3rd Cir. 1962); *Guziak* v. *Federal Trade Commission*, 361 F.2d 700 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967).

The complaint did not specifically allege that Ogilvy & Mather was in "substantial competition in commerce with individuals, firms and corporations engaged in the promotion and sale of spray anti-perspirants of the same general kind as Dry Ban." This is a technical defect of no substance. The allegation was implicit in the complaint as a whole and, was, in any event, tried in this proceeding; there is no question that Ogilvy & Mather understood the issues and had full opportunity to defend. *Golden Grain Macaroni Co.* v. *Federal Trade Commission*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, May 29, 1973, 412 U.S. 918.

CONCLUSIONS

(1) The Dry Ban commercials "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," had the tendency and capacity to convey, and conveyed, materially false, misleading and deceptive representations concerning the physical characteristics and product features of Dry Ban spray anti-perspirant, and were therefore false, misleading, and deceptive.

(2) Respondents knew or should have known when they disseminated the Dry Ban commercials "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," that those commercials had the tendency and capacity to convey, and conveyed, materially false, misleading, and deceptive representations concerning the physical characteristics and product features of Dry Ban spray anti-perspirant, and were therefore false, misleading and deceptive.

(3) The dissemination by respondents Bristol-Myers and Ogilvy & Mather in commerce of the false, misleading, and deceptive commercials "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses," had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the representations in them were true, and into the purchase of substantial quantities of Bristol-Myers' Dry Ban spray anti-perspirant because of such erroneous and mistaken belief.

(4) The acts and practices of respondents Bristol-Myers and Ogilvy & Mather, as alleged in the complaint and as found herein, were to the prejudice and injury of the public and of their competitors, and constituted unfair and deceptive acts and practices, and unfair methods

of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Relief

Part I of the order issued herein prohibits each of respondents from advertising "Dry Ban spray anti-perspirant or any other product" in commerce "by presenting evidence, including tests, experiments or demonstrations or parts thereof" as actual proof of any fact or product feature that is material to inducing the sale of such product, or of such product's superiority over brands in competition therewith, which evidence does not actually prove "such fact, product feature or product superiority." This order is the same as to respondent Bristol-Myers as the notice order.

With respect to Ogilvy & Mather, however, the notice order would have applied to Dry Ban spray anti-perspirant or any other "anti-perspirant or deodorant," whereas part I of the order issued herein applies the same coverage to Ogilvy & Mather as applied to Bristol-Myers, *viz.*, Dry Ban spray anti-perspirant "or any other product" in commerce. In other words, part I of the order represents significantly broader product coverage as to Ogilvy & Mather than contained in the notice order. Although, of course, respondents do not agree to the entry of any order in this proceeding, they object, if any order is to be entered, to broad product coverage.

Bristol-Myers argues that its divisions and subsidiaries manufacture over 283 different items and that corporate management "exercised no control over the advertising decisions with respect to at least the products of the Products Division" (memorandum of Bristol-Myers in Reply, p. 34). Further, Bristol-Myers contends that an order applicable to all its products would be "punitive," would subject Bristol-Myers to restraint "more rigorous than any which has been imposed upon an advertiser in any litigated case," and would impose on it the burden of making compliance reports for all of its advertisements for all 283 products. Bristol-Myers further contends that the order is vague, and that it will be impossible in the future to determine what conduct would constitute a violation.

The circumstance that Bristol-Myers is a very large company with a number of divisions and subsidiaries, and hundreds of products provides little reason for limited product coverage. Corporate management at the "top" has an obligation and a responsibility to police the company's promotional and advertising practices. Indeed, the size and importance of Bristol-Myers, and the fact that it engages in advertising of great magnitude to the extent of approximately $225,000,000 annually, using local, regional, and national media, would seem in view of the present record to point to the urgency of careful "fencing in" rather than the reverse. What is involved in this proceeding is not simply a question of misrepresentation of the physical characteristics of Dry Ban, but an issue of responsibility and integrity in advertising. Respondents disseminated the challenged commercials over a 14-month period from July 1969 to Sept. 1970 (CX 82) at a cost of $5,800,000 (CX 81) notwithstanding information coming to them prior to and during such dissemination that substantial segments of the public were being seriously misled and deceived by the demonstrations in them. The demonstration technique used in "Rusty," "Show-Up," "Dry Manhattan," "Spotty Performance," and "Glasses" is readily adaptable to a large proportion of Bristol-Myers' products, over forty (40) of which are advertised over television (CX 84), and 90 percent are advertised in some medium (Edmondson, Tr. 1629). It is unreasonable to require the public to undertake the high costs of investigation and adjudication repeatedly against a respondent. If the order herein is limited to Dry Ban spray anti-perspirant and other anti-perspirants and deodorants, future Commission proceedings may have to be undertaken to end violations similar to the one here in issue. Respondent has no right to insist that the public bear this risk. There is no necessary assumption in this viewpoint that respondent is likely to violate the law in the future, only that the public is entitled to take the most effective action available to close the door to such a possibility. The Commission has a responsibility to ensure that future violations similar to those involved herein do not occur, as noted under "Discussion," and has wide discretion in fashioning a remedy to achieve that objective. *Federal Trade Commission* v. *Ruberoid Co., supra*, 343 U.S. at 473; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-430 (1957). The authority of the Commission to issue an order applicable to all products of a respondent is clear. *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F.2d 337, 342-343 (7th Cir. 1960), rehearing denied June 8, 1960, *cert. denied*, 364 U.S. 883; *Benrus Watch Company* v. *Federal Trade Commission*, 352 F.2d 313, 324 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Western Radio Corp.* v. *Federal Trade Commission*, 339 F.2d 937, 940 (7th Cir. 1964), *cert. denied*, 381 U.S. 938; *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F.2d 523, 532-33 (5th Cir. 1963); *Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F.2d 404 (2nd Cir. 1952); *Firestone Tire & Rubber Company*, [*aff'd*,] 481 F.2d 246 (6th Cir. 1973) [*cert. denied*, 414 U.S. 1112, (1973)], CCH 1973 Trade Cases, Vol. 5, ¶94,581. In the latter case the Court of Appeals affirmed the order of the Commission prohibiting the misrepresentation of quality control or inspection procedures in the marketing of tires "or any other product." Although there are decisions which have limited broad product coverage, they have done so on the conclusion that the broad coverage bore no reasonable relation to the violation found. *E.g., American Home Products Corp.* v. *Federal Trade Commission*, 402 F.2d 232 (6th Cir. 1968).

Part I of the order herein, in the judgment of the undersigned, is necessary, appropriate and reasonably related to the violation. Indeed, the case most nearly like this one involved a broad product order which was sustained by the Supreme Court. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 62 F.T.C. 1269 (1963). In that case the Commission remarked, in refusing to issue an order with narrow, limited product coverage (62 F.T.C. at 1276):

> We consider, finally, the questions of (1) the applicability of the "demonstration" part of the order to all products advertised by Colgate.* * *
>
> The Court of Appeals recognized, without deciding, that if a certain type of advertising demonstration is unlawful, "it might be appropriate * * * to enter a broad order forbidding all such demonstrations en masse." We think that the entry here of such a broad order is not only appropriate but, in the circumstances presented, our duty to the public and honest competitors under the Federal Trade Commission Act. It would be less than adequate protection of consumers and competitors to enjoin the use of this unfair method of competition (*i.e.*, sham "demonstrations" that actually demonstrate or prove nothing) only insofar as it could be used in advertising one product, but not others. Respondents having been found to have engaged in that unlawful practice, the Commission was obliged to order them to stop it once and for all. If the function and purpose of a cease and desist order here are to halt respondents' unfair method of advertising, it would make no sense for the order to forbid them to stage spurious television demonstrations in advertising shaving cream, but to allow them to continue the practice in advertising toothpaste or soap.

The Supreme Court affirmed the Commission order noting that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Federal Trade Commission* v. *Colgate-Palmolive*, 380 U.S. 374, 394 (1965).

The argument that the terminology of Part I is vague, and fails to delineate clearly what advertising may constitute a violation of the order, is rejected. In *Colgate* the Supreme Court considered a similar claim, and rejected it noting (380 U.S. at 393):

> The crucial terms of the present order-"test, experiment or demonstration* * *represented* * *as actual proof of a claim"—are as specific as the circumstances will permit. If respondents in their subsequent commercials attempt to come as close to the line of misrepresentation as the Commission's order permits, they may without specifically intending to do so cross into the area proscribed by this order. However, it does not seem "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

The phrase in Part I "that is material to inducing the sale of such product" was included in the notice order, and has not been omitted here despite the urging of complaint counsel. It is true that the Commission may infer materiality of a representation. *Federal Trade Commission* v. *Raladam*, 316 U.S. 149 (1942). Nevertheless, the foregoing language in the order is not mere "surplusage." As counsel for respondent Bristol-Myers states, a "representation that is not material is not an illegal one." Also, the word "experiments" found in the notice order has been retained. Complaint counsel would substitute "studies." The thrust of Part I of the order, which was derived from the allegations of the complaint, is to prohibit the presentation of evidence which "invites the viewer to rely on his own perception for demonstrative proof of the claim" as the Court observed in *Colgate, supra*, 380 U.S. at 393. "Experiments" is tailored to that concept, as the notice order recognized, whereas "studies" would extend the order far beyond that concept. "Demonstration" and "experiment," are not precisely synonymous, in the opinion of the undersigned, so there is no redundancy.

What has already been said applies in essentials to Ogilvy & Mather. It is true, as counsel for that firm emphasize, that Ogilvy & Mather has no history of law violations. As has been found, Ogilvy & Mather was an active participant in the preparation of the commercials, and knew or should have known that the commercials had the tendency and capacity to communicate false, misleading, and deceptive representations. *Doherty, Clifford, Steers & Shenfield, Inc.*, v. *Federal Trade Commission*, 392 F.2d 921 (1968); *ITT Continental Baking Company, Inc.*, Docket 8860, Order and Opinion of Oct. 19, 1973 [83 F.T.C. 865]. Ogilvy & Mather, moreover, was in a unique position to terminate the false, misleading and deceptive commercials utilized in this proceeding. Prior findings make this circumstance very clear. When the results of the consumer surveys were under analysis, and reports were being prepared for respondent Bristol-Myers, Ogilvy & Mather knew or should have known that substantial numbers of the persons tested received a false, misleading, and deceptive message. Ogilvy & Mather, nevertheless, failed to take any action whatever to discontinue dissemination of the advertising. The technique of a demonstration utilized in the challenged commercials, moreover, plainly is not unique to Dry Ban, but may be employed in the promotion of many different products. Under the circumstances there is nothing inappropriate in the application of a broad order to respondent Ogilvy & Mather, as was done in *Colgate* with respect to the advertising firm there involved.

As made abundantly clear herein, the challenged commercials misrepresented the physical characteristics and attributes of Dry Ban. An order provision prohibiting such misrepresentations in the future is therefore necessary in the public interest. The complaint in this proceeding is very similar to that issued in *Colgate*, 59 F.T.C. 1452 (1961), and there an order provision enjoining future misrepresentations was issued. 62 F.T.C. 1269 (1963).

The more limited product coverage in Part II applicable to Bristol-Myers, that is, Dry Ban spray anti-perspirant or any other product "applied to the body," and applicable to Ogilvy & Mather, Dry Ban spray anti-perspirant "or any other anti-perspirant or deodorant" is tailored to the misrepresentations in both instances. Although the language of any order may be susceptible to difficulty in interpretation, the terminology "applied to the body" is as precise as circumstances permit, In *Colgate* the Commission regretted issuing originally a very narrow order relating to misrepresentation remarking (62 F.T.C. 1277):

> In respect to the prohibition against misrepresentation of the quality or merits of products, our previous order was narrowly limited to Rapid Shave and other shaving creams. In view of our findings as to respondents' misrepresentations in that regard, as well as the fact that respondents are already subject to a number of outstanding orders and stipulations containing similar prohibitions with respect to other products, the Commission would be amply justified in extending the prohibition against such misrepresentations to all products similarly advertised by respondents. However, since our earlier order, though perhaps overly generous to respondents, has in this regard been reviewed and sustained by the Court of Appeals, we will not disturb the limitation to Rapid Shave or other shaving creams.

The order herein avoids the extreme narrowness of the original *Colgate* order, yet as to misrepresentation would not encompass every Bristol-Myers product. It is even more narrow with respect to Ogilvy & Mather. Admittedly, a degree of discretion and judgment is involved. There are differences in presenting a demonstration, or the like, as actual proof of something it does not in fact prove, and misrepresenting the physical characteristics or other features of a product. In the opinion of the undersigned the product coverage of Part II of the order is also appropriate, necessary, and reasonably related to the violation found.

The order issued herein is fully justified on the basis of the facts brought out in this proceeding. Additional support for it with respect to Bristol-Myers, however, may be found in the past record of that respondent. As complaint counsel emphasize, Bristol-Myers is no stranger to Federal Trade Commission proceedings. Bristol-Myers has been the recipient of three (3) prior litigated cease and desist orders involving false and deceptive advertising, has entered into six (6) prior stipulations and one (1) consent settlement relating to the advertising of seven different products, and was the subject of a relatively recent decision by the Commission that a finding of false and misleading advertising of an analgesic drug was "supportable" on the record, although no order was entered. *Orders:* 36 F.T.C. 707 (1943), order prohibiting misrepresentation of the therapeutic effect of a laxative; 46 F.T.C. 162 (1949), order prohibiting misrepresentation of the results of a survey of dentists regarding the use and recommendations for Ipana toothpaste and claims of therapeutic value of that toothpaste; 71 F.T.C.

822 (1967), *aff'd* in part, 418 F.2d 489 (5th Cir. 1969), prohibiting misrepresentation of the therapeutic effect of hemorrhoid preparations; *Stipulations:* 24 F.T.C. 1546 (1937), relating to health claims for "Vitalis;" 24 F.T.C. 1554 (1937), relating to claims for Ipana toothpaste as an effective treatment for gum diseases; 24 F.T.C. 1558 (1937), relating to claims for "Sal Hepatica," a laxative, as a purge of poisonous wastes from the body, and as effective in the treatment of various maladies; 25 F.T.C. 1626 (1937), claims for "Minit-Rub" cold remedy; 27 F.T.C. 1602 (1938), relating to skin claims for "Ingram's Milkweed Cream"; and 27 F.T.C. 1609 (1938), claims of health benefits from "Ingram's Shaving Cream." In 47 F.T.C. 1441 (1950), a consent agreement and order were entered requiring discontinuance of claims that "Resistab," a cold preparation, would cure, prevent, or shorten the duration of a common cold. In 74 F.T.C. 780 (1968), as stated, the Commission found a violation of Section 5 for false and deceptive advertising of an analgesic drug "supportable" on the record, but terminated the proceedings without an order.

Bristol-Myers objects to consideration of past orders and stipulations based on consent rather than "full evidentiary adjudication," and notes that settlements are often entered into for extraneous reasons, to avoid expense, publicity, etc. Bristol-Myers further argues that, even if considered, past orders and stipulations entered against it or involving it are relatively insignificant when viewed against its background of selling 283 different products through seven separate divisions with advertising expenditures of $225 million annually, and extensive marketing and advertising activities extending over many years since the 1930's.

These objections, however, are not well taken. The foregoing record of Bristol-Myers is not *de minimis* or one of "ridiculous insignificance" (Supplemental Memorandum of Bristol-Myers of Oct. 29, 1973, p. 3). The past record of a respondent is relevant to consideration of the order to be entered. Consent orders have consistently been considered by the Commission in weighing the scope or propriety of orders to be issued in particular cases. *ITT Continental Baking Company*, Docket 8860, Order and Opinion of Oct. 19, 1973 [*supra*]; *Colgate-Palmolive, supra*, 62 FTC at 1277. In the former case, in ruling on the objection of Ted Bates & Co., Inc., to broad product coverage, the Commission remarked that "Bates is already subject to a series of cease and desist orders entered both after litigation and on consent based on challenges to advertising in which it participated as illegal under Section 5 of the F.T.C. Act." The Commission then cited four consent orders. In *Colgate* the Commission in deciding the scope of product coverage noted that "respondents are already subject to a number of outstanding orders and stipulations containing similar prohibitions with respect to other products." Two consent orders and two stipulations were then cited.

It is well established that past violations have a bearing on the remedy to be invoked. In addition to the foregoing *ITT Continental* and *Colgate* cases, the Commission considered past orders in the recent *Firestone* proceeding. There the Commission specifically stated (CCH Trade Reg. Rep., 1970-73 Transfer Binder at pp. 22084-85 [*supra*]):

> Past conduct, in fact, must determine to some extent what the proper scope of relief should be.

As stated, Bristol-Myers has been the subject of three (3) past litigated orders and a fourth litigated matter where the Commission found an order "supportable" on the record, but did not issue it because to do so would give rise to certain questions relating to asserted deficiencies in the pleadings "which it would serve no further purpose to litigate," and on the hope that Bristol-Myers would "comply with the full requirements of the law and not again disseminate advertising of this character that may be misleading to the consuming public," 74 F.T.C. at 855. In view of this record the statement of the Court of Appeals in *Carter Products*, *supra*, rejecting an objection that a broad order should not have been entered by the Commission is material (323 F.2d at 532):

> Twice before this suit, Carter has litigated orders dealing with similar offenses.

In *Federal Trade Commission* v. *National Lead Co.*, *supra*, 352 U.S. at 429, the Supreme Court in deciding the propriety of a Commission order, affirmed it as having a "reasonable relation the unlawful practices found to exist." Three reasons were cited including the fact that National Lead "had been previously adjudged a violator of the antitrust laws." The past record of respondent Bristol-Myers, therefore, may properly be considered in determining the order to be entered herein, and the undersigned has considered that record as additional justification for the order issued.

ORDER

I

It is ordered, That respondent Bristol-Myers Company, a corporation, and Ogilvy & Mather, Inc., a corporation, their successors and assigns, and respondents' officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Dry Ban spray anti-perspirant or any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

Advertising any such product by presenting evidence, including tests, experiments or demonstrations or parts thereof, that is presented as actual proof (a) of any fact or product feature that is material to inducing the sale of such product, or (b) of such product's superiority over brands in competition with such product, but which evidence does not actually prove such fact, product feature or product superiority.

II

It is ordered, That respondent Bristol-Myers Company, a corporation, its successors and assigns, and respondent's officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Dry Ban spray anti-perspirant or any other product applied to the body, in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

Misrepresenting, directly or by implication, any physical characteristic or other feature or features of such product.

It is ordered, That respondent Ogilvy & Mather, Inc., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Dry Ban spray anti-perspirant or any other anti-perspirant or deodorant in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

Misrepresenting, directly or by implication, any physical characteristic or other feature or features of such product.

III

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, merger, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or of any other changes in the corporation which may affect compliance obligations arising out of the order.

OPINION OF THE COMMISSION

APRIL 22, 1975

BY HANFORD, *Commissioner:*

This case is before the Commission on appeal of respondents Bristol-

Myers and Ogilvy & Mather and the cross-appeal of complaint counsel from the initial decision issued on Nov. 28, 1973 by Administrative Law Judge Daniel H. Hanscom. Judge Hanscom found that five television commercials which formed respondents' advertising campaign for "Dry Ban" anti-perspirant spray falsely represented that Dry Ban is a dry spray that is not wet when applied to the body, that it leaves no visible residue after application to the body, and that it is superior to competing sprays because of these characteristics.[1] He ordered both respondents to cease advertising by presenting evidence which does not prove that which it purports to prove. He also ordered Bristol-Myers to cease misrepresenting physical attributes of products applied to the body and Ogilvy & Mather to cease misrepresenting physical attributes of deodorants and anti-perspirants.

Respondent Bristol-Myers, a maker of over-the-counter pharmaceuticals, cosmetics, and household products, and its advertising agency, respondent Ogilvy & Mather, developed the advertising campaign for Bristol-Myers' "Dry Ban" anti-perspirant which formed the basis for the complaint.[2] This campaign ran from July 21, 1969 until Sept. 11, 1970.[3]

Each of the commercials contains a humorous sequence and a demonstration in which Dry Ban is compared to a "leading spray."[4] Judge Hanscom's findings that the commercials represented Dry Ban to be a non-wet spray leaving no residue when applied to the body were based both on the Judge's personal observation of the commercials[5] and on his analysis of a series of test marketing reports prepared at the request of Ogilvy & Mather.[6]

Judge Hanscom's finding that these representations were false is based primarily on an experiment which was performed by complaint counsel in his presence and replicated on videotape.[7] In this experiment, Dry Ban was sprayed on glass and on a human forearm and was found both to be "wet, runny, liquid, and watery" and to leave an "obvious residue."[8] Respondents, however, object to a finding of wetness based on this demonstrative evidence because of the fact that in the experiment the product was sprayed downward, contrary to ordinary usage.

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[1] FF 12, 48, 51, 52.

[2] FF 46.

[3] CX 81.

[4] CX 1-10. In four of the five commercials ("Rusty," "Show-Up," "Dry Manhattan," and "Spotty Performance"), the demonstration is identical. The demonstration in the fifth, "Glasses," is conceptually similar, but differs in execution (FF 9).

These demonstrations, as viewed by the ALJ, tended to show Dry Ban to be "clear" and "clean" as contrasted with the "oily," "opaque," "creamy," and "whitish" appearance of the competing product. FF 7, 8, 10, 14.

[5] FF 12-13.

[6] I.D. 46.

[7] Tr. 790-96, 845-46, CX (Physical Exhibit) 8.

[8] FF 52.

After exhaustive review of this record, we find that it fails to establish a violation of Section 5. While it is within our purview to remand for further proceedings, we have determined instead to dismiss this complaint.

The Representation

Like the administrative law judge, the Commission has viewed filmed versions of the challenged commercials.[9] Unlike the law judge, the Commission perceives them as representing only Dry Ban's superior qualities of dryness as compared to a leading competitive spray, and not that respondents' product was dry by some absolute standard. Indeed, we noted that the commercials themselves show Dry Ban to be somewhat wet.[10]

Our viewing of the filmed versions of the commercials also fails to convince us that they contain the message that Dry Ban leaves no visible residue after application to the body. Although no residue appeared in the demonstration portion of the commercials, this phase consumes but a matter of seconds. We are therefore unable to conclude from our viewing that the commercials represent that no residue or deposit will remain when the product dries.[11]

Turning to the test marketing reports in this record, we must dismiss any contention that the F.T.C. is bound to reject these consumer surveys as inadmissible hearsay.[12] The Commission has on numerous occasions considered the question of the admissibility of surveys which are obviously hearsay, and it is well settled that such surveys will be admitted for the truth of the matters asserted when it is demonstrated that they are reasonably reliable and probative.[13] Upon thorough and independent examination of the record in this proceeding, we find that the surveys in question readily meet these standards;[14] thus, they were properly admitted by the administrative law judge. Respondents' contentions to the contrary are without merit.[15]

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[9] In determining the meaning of an advertisement, the Commission may rely upon its own inherent expertise, *FTC v. Colgate Palmolive*, 380 U.S. 374, 391-92 (1965); Firestone Tire & Rubber Co., 81 F.T.C. 398, 454 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); *Niresk Industries, Inc. v. FTC*, 278 F.2d 337, 342 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960); *Kalwajtys v. FTC*, 237 F.2d 654, 656 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957); it may supplement its expertise, if it so chooses, by electing to adopt the results of consumer surveys found to be methodologically sound, ITT Continental Baking Co., Inc., D. 8860 (1973); Firestone Tire & Rubber Co., 81 F.T.C. 398, 454 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); Benrus Watch Co., Inc. 64 F.T.C. 1018, 1044-45 (1964), *aff'd*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); Rhodes Pharmacal Co., Inc., 49 F.T.C. 263, 283 (1952), *order modified*, 208 F.2d 382 (7th Cir. 1953), *modification of order rev'd, order reinstated in toto*, 348 U.S. 940 (1955); Arrow Metal Products Corp., 53 F.T.C. 721, 727, *aff'd per curiam*, 249 F.2d 83 (3rd Cir. 1957).

[10] *See, e.g.*, the comments of Chairman Engman, transcript of oral argument 30-31.

We note, however, that the wetness might or might not be as obvious on a television screen as it was on film and that normal distractions associated with television viewing in the home might cause the viewer to miss the wetness which was portrayed. It should also be noted that we watched the commercials knowing that the key issue was whether Dry Ban was represented as being dry; thus we were looking for wetness. Additionally, our attention was directed to the area of wetness by a pointer. In one commercial, "Glasses" (CX 5), the wetness was sufficiently inconspicious that a substantial number of consumers might reasonably be expected not to notice it. The critical issue here is not whether the Commission, under the circumstances, was misled by the commercials, but whether the general viewing public, including its credulous and gullible members, might be misled. *FTC v. Standard Education Society*, 302 U.S. 112, 116 (1937); *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942).

[11] We do not, however, reject the possibility that consumers might infer from Dry Ban's admitted clarity that it does, in fact dry without residue.

[12] *Buchwalter v. FTC*, 235 F.2d 344 (2nd Cir. 1956); *Phelps Dodge Ref. Corp. v. FTC*, 139 F.2d 393 (2nd Cir. 1943).

The administrative law judge examined the surveys in detail to determine whether consumers thought the challenged commercials conveyed the "dryness" and "no residue" messages.[16] He concluded that "a substantial portion of the public" perceived the message that Dry Ban was dry upon application to the body.[17] Our reading of the surveys differs from that of the law judge. While we agree that a substantial number of consumers surveyed (probably somewhere between 14 percent and 33 percent) understood Dry Ban to be "dry,"[18] we do not agree that they meant "dry" in the sense of total non-liquidity. After a careful examination of the verbatim responses which formed the basis of the judge's findings,[19] we conclude that the vast majority of these consumers intended by the word "dry" a looser, more colloquial meaning.[20] We believe that most of these consumers understood the commercials' message to be that Dry Ban was drier than the comparison product or that Dry Ban was relatively dry as compared to spray deodorants and anti-perspirants in general. The number of verbatims which we believe indicate a perception that Dry Ban was wholly lacking in liquidity in the sense litigated in this case is too few on which to base a finding that the commercials contained this message.

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[13] Pillsbury Mills, Inc., 57 F.T.C. 1274, 1397 (1960); Crown Zellerbach Corp., 51 F.T.C. 1105 (1955); ITT Continental Baking Co., Inc., D. 8860 (Oct. 19, 1973). *See V Wigmore on Evidence* 202-06 (3rd Ed. 1940). *Cf. John Bene & Sons, Inc.* v. *FTC*, 299 F. 468, 471 (2nd Cir. 1924).

[14] In reaching this decision, we refer generally to finding of fact 47 of the initial decision and specifically rely on the following factors:

1. The three research organizations running the surveys were all experienced at taking such surveys, Tr. 10-14, 211-15, 264, 309-13.

2. The witnesses who managed the three research organizations, Dr. Henry Ostberg, Dr. Donald Schrader, and Mr. Charles Rosen, were all highly experienced, with excellent academic credentials for survey work, Tr. 9-10, 211-12, 308-09.

3. Both respondents dealt with these companies for years regarding this kind of work, Tr. 14, 213-15, 313.

4. The surveys appeared to have been performed in the usual manner for surveys of this type.

5. Those conducting the interviews were experienced and trained, Tr. 219, 257, 327-28.

6. The surveys employed controls and validation procedures, Tr. 34, 36, 255-57, 270-71, 330.

7. While the samples were not scientifically drawn utilizing probability sampling procedures, those interviewed probably reasonably represented the class of anti-perspirant users or female anti-perspirant users (this differed from survey to survey), Tr. 27-28, 38, 247-49, 323-26.

8. The research was conducted at the instance of, for the benefit of, and often with the participation of both respondents, Tr. 21-22, 45, 143-44, 246, 314-15, 321-22, 326, 334, 658.

9. There was no incentive for the research organizations to be biased.

10. The surveys are from independent sources and tend to confirm one another.

[15] In addition to the hearsay argument, Bristol-Myers contends that an insufficient foundation was laid and that the surveys were not projectable to the relevant population. Both of these contentions go to weight rather than to admissibility and we treat them accordingly.

[16] FF 23-34, 39-45.

[17] FF 48.

[18] The Commission's expert witness, Dr. Wells, testified that one-quarter to one-third of consumers so perceived the commercials. Tr. 947. Fourteen percent of consumers surveyed stated that the message of the "Glasses" commercial (CX 5) was "Ban sprays on dry." (CX 60 (18).

[19] CX 99.

[20] We note, in passing, that the word "dry," in general parlance, has more than one meaning. Thus *Webster's Third New International Dictionary of the English Language* 696 (1961) defines "dry" as "free or relatively free from water or liquid."

The administrative law judge also found that "a substantial portion of the viewing public equated 'clear' and 'clean' with a representation that Dry Ban left no visible residue after application."[21] An examination of the verbatim responses shows, however, that the vast majority of those who perceived Dry Ban as "clear" or "clean" merely perceived it as clear on application, distinguishing it from the opaqueness of the competing brand. We do not believe we can infer from a consumer's use of the word "clear" in this context that he believed Dry Ban would leave no visible residue. While a few verbatims indicate a definite perception that no visible residue would be left, that figure is on the order of 2-4%, a percentage which we find patently insubstantial in this context. In a word, we reject the finding that the commercials promised "no residue."

Proof of Falsity

The theory on which this case was tried was that respondents falsely represented that Dry Ban was dry and clear and therefore superior to competing sprays when in fact the product was wet and left a visible residue after application - an absolute claim. The case was not tried on the additional theory that respondents misrepresented that Dry Ban was superior because it was drier or clearer than the leading spray depicted in the commercial - a relative claim.

On the first day of the presentation of the case-in-chief, complaint counsel stated her case to be:

> The charges in paragraph 5 of the complaint are that by means of a demonstration comparing Dry Ban with an unidentified spray respondents misrepresented that Dry Ban is a dry spray that is not wet when it is applied;[22]

In stating what she intended to prove, complaint counsel said that "[w]e will then demonstrate that these representations are, in fact, false in that Dry Ban is not dry at the moment it is applied, but is wet* * *"[23] Believing, however, that the complaint alleged also that commercials misrepresented that Dry Ban was drier than the leading spray, counsel for Bristol-Myers requested discovery of the physical characteristics of competing sprays including the leading spray depicted in the commercials. The administrative law judge responded:

> [A]s I see it the issues raised by the complaint concern the quality and characteristics

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[21] FF 45.

[22] Tr. 2.

[23] Tr. 3-4.

> of Dry Ban and whether or not the demonstrations described in paragraph 4 of the complaint were false and misleading or had the capacity to mislead or deceive the public as to the qualities and characteristics of Dry Ban.
>
> Hence, the characteristics and qualities . . . of competing spray anti-perspirants are not material to the issues raised in the complaint, and that is the position that I have formulated in my mind having given careful consideration to the depositions before we came in here today.[24]

The law judge's perception that the case was based upon only one theory of liability remained the same throughout.

> [T]he focus of the entire proceeding is on the characteristics of Dry Ban, not the other spray* * *
>
> I think this has come up several times previously in this proceeding. On each occasion I believe I have taken the position that the complaint relates to the characteristics of Dry Ban and whatever was presented to the public by virtue of the Dry Ban advertising.[25]

When respondents offered evidence of the physical characteristics of the leading spray depicted in the commercials (Arrid Extra Dry), complaint counsel objected. The law judge again noted that:

> * * * the entire focus is on Dry Ban and whether it is dry or not dry or leaves a visible residue or not, not in comparison with Arrid* * * [W]hy obfuscate the issue or confuse the record if we're not really concerned with the characteristics of* * * Arrid Extra Dry.[26]

Thereafter he emphasized that "I don't intend to base anything I may write on this case on the characteristics of Arrid. I do not see this as a comparative between 'A' and 'B,' I see it as a complaint alleging that certain representations were made as to the product Dry Ban."[27]

As we have indicated, our view of the commercials suggests that relative rather than absolute claims were made.[28] Evidence, however, was accepted only on an absolute claim theory. Thus, to find a violation here a remand would be necessary. Such a remand would require a broad-scoped refocusing, perhaps including the additional discovery disallowed initially by the administrative law judge.

In the instant case, the public interest would be ill served by such a remand. A number of factors, when taken together, lead us to this determination. Those persons affected do not constitute a particularly vulnerable group. There is no health or safety consideration which might legitimately demand further expenditure of public funds; nor is there significant economic harm to a consumer who purchased the product and found it "less dry" than anticipated.[29] The advertising in question was terminated over four years ago. There is no indication on this record that competition was adversely affected by whatever deception might be proved on remand; nor are we dealing here with intentional wrongdoers.

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[24] Prehearing transcript at 8.

[25] Tr. 1106.

[26] Tr. 1107-08.

[27] Tr. 1114.

[28] Since we do not view the Commercials as claiming absolute dryness, it is unnecessary for us to determine the admissibility of the demonstration of Dry Ban's alleged absolute wetness.

[29] A can of Dry Ban retailed for about $1. Moreover, even those who bought the product for its dryness would likely not find it wholly worthless.

In the past, when constrained by failure of proof to choose between remand and dismissal, we have not hesitated to terminate proceedings when the public interest so required.[30] This, we conclude, is the posture of the case before us.

An appropriate order will be entered vacating the order issued by the administrative law judge and dismissing the complaint.

Commissioner Nye not participating.

CONCURRING OPINION OF COMMISSIONER MAYO J. THOMPSON

APRIL 22, 1975

BY THOMPSON, *Commissioner:*

If the American consumer has no more serious problem than the possibility of being deceived as to the relative "dryness" of his underarm deodorant, he is in much better shape than I had been led to suppose at the time I joined this agency.

Bristol-Myers, a manufacturer of various drug, cosmetic, and other products, introduced an underarm deodorant called "Dry Ban" in 1968. Competing for an overall anti-perspirant and deodorant market estimated at more than $300 million per year, respondent and its advertising agency naturally sought to develop an advertising theme or "story" that would distinguish this new product from such competing deodorants as "Arrid," "Right Guard," "Secret," and others. Its principal mark of distinction, it seems——this record is silent as to whether it is better or worse than the others in doing what a deodorant is supposed to do——is the fact that, because it is formulated with an alcohol rather than an oil base, it looks "clear" when sprayed on a surface rather than having the kind of "oily," "opaque," or "creamy" ("whitish") appearance that is supposed to be characteristic of those competing deodorants.[1] A total of five (5) commercials prepared by the company's advertising agency, Ogilvy & Mather, were broadcast on television during the 14-month period between July 21, 1969 and Sept. 11, 1970, at a total cost of $5.8 million.[2] The product's sales amounted to some $7.4 million in 1969 and $7.9 million in 1970.[3] These advertisements, having failed to significantly increase respondent's share of the deodorant market-the product now has, we are told, some 1 percent of that market[4]-was withdrawn in Sept. 1970 and have not been used since.

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[30] Pfizer, Inc. 81 F.T.C. 23, 73 (1972). *See* Modern Methods, Inc., *et al.* 60 F.T.C. 309 (1962). *Cf. Dr. W. B. Caldwell Inc. v. FTC*, 111 F.2d 889 (7th Cir. 1940); *Exposition Press v. F.C.T*, 295 F.2d 869 (2nd Cir. 1961), *cert. denied*, 370 U.S. 917 (1962).

[1] Initial decision of the administrative law judge (Nov. 28, 1973), p. 5 [pp. 692-693, herein].

[2] *Id.*

[3] *Id.*

The Commission's complaint, issued on Sept. 12, 1972, alleged that these 5 TV commercials falsely and deceptively represented to consumers that "Dry Ban" is (1) a "dry" spray, *i.e.*, one that is "not wet" when applied to the body, and that it (2) leaves no "visible residue" when applied to the body. "In truth and in fact," the complaint alleged:

1. Dry Ban is not a dry spray and it is wet when applied to the body, and
2. After application to the body, Dry Ban dries out leaving a visible residue.[5]

The evidence offered by complaint counsel in support of this alleged deception is in three parts, (a) the 5 advertisements themselves; (b) a series of test reports prepared by certain marketing research organizations at the request of respondent's advertising agency, Ogilvy & Mather; and (c) a demonstration of the product's actual use in the hearing room and as prerecorded on videotape. From the first we learn what the ads *said* (and showed); from the second we learn, according to complaint counsel, what the ads *meant* to the consuming public; and from the last we learn that the product is "wet," "runny," "watery," and leaves an "obvious residue."[6]

There is, as discussed below, only a minor evidentiary dispute on the first point.[7] The advertisements in question focus on a purported demonstration of the relative merits of "Dry Ban," on the one hand, versus a "leading" brand (unidentified) of anti-perspirant spray, on the other. In one sequence, the two products are sprayed on adjacent surfaces to the accompaniment of an announcer's voice saying, "the leading spray goes on like this" and "Dry Ban goes on like this." The area sprayed with the "leading" brand appears in the film as a "whitish, creamy, and thick deposit," while the area sprayed with "Dry Ban" is shown as an "apparently clear and dry area.* * *"[8] A finger is pictured running through the two areas, the former appearing "thick and wet" while the other shows "no apparent effect, or one so slight as to probably escape notice. The announcer states, 'Which do you prefer?' A close-up of a can of Dry Ban is then shown and the label 'Dry Ban' virtually fills the television screen. Each commercial concludes with a scene of the characters shown initially singing or stating, 'How dry I am.' "[9]

The second sequence, one used in a commercial called "Glasses," involves a scene with two girls and a man in an elevator. The two girls are discussing their respective anti-perspirant sprays, both claiming theirs "helps keep you dry." One of the girls, to prove that hers is better, "reaches up and takes off the man's glasses, to his surprise, and sprays the first girl's anti-perspirant on one of the lenses saying, 'Yours goes on * * * like this.' A whitish, creamy, and thick deposit is shown covering most of the lens where the 'leading anti-perspirant' has been sprayed. The second girl then sprays Dry Ban on the other lens saying, 'My Dry Ban goes on . . . like this.' The camera shows a close-up of the lens where Dry Ban has been sprayed revealing it to be clear and apparently dry, without a visible deposit. The first girl then says, 'Uh * * * hmm * * * I see the difference.' "[10]

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[4] Transcript of oral argument (Apr. 24, 1974), p. 22.

[5] Complaint (Sept. 12, 1972), paragraphs 5 and 6, p. 3 [p. 690, herein].

[6] Initial decision, *supra*, p. 43 [p.723, herein].

[7] The films of these 5 TV commercials are included in the record as CX 1-5 and were viewed, as noted, by both the law judge and the Commission.

[8] Initial decision, *supra*, p. 6 [p. 694, herein].

[9] *Id.*, p. 6[p. 694, herein].

The learned law judge found from these commercials that they "all collectively had the tendency and capacity to represent to the viewing public that Dry Ban was dry, went on dry and left no discernible or visible residue on application, and that a real demonstration was taking place actually proving those characteristics, and the superiority of Dry Ban because of them."[11] Considerable emphasis was placed here on a series of test marketing reports received in evidence and involving, to use one example, the technique of asking a group of shoppers in a shopping center to view the ads on videotape (a mobile "van" was taken to the shopping center and used as a studio) and then respond to a series of questions designed to find out what "message" those viewers got from the commercials. The message received, according to these test reports, was that "Dry Ban" was "clear and dry" while the competing products were "creamy" and "greasy."[12] Having learned from these marketing research reports "that a substantial portion of the viewing public interpreted the challenged commercials as conveying those [false] representations," and having nonetheless continued to run those ads, respondents should not be heard to argue, in the law judge's view, that they really meant something else.[13]

The judge's findings on the *actual* characteristics of the product involved here are persuasive enough, *i.e.*, a "*live* comparative demonstration in which Dry Ban and an oil base competing spray anti-perspirant are sprayed in juxtaposition results in the perception of Dry Ban as watery, wet, and runny."[14] And his finding that these characteristics are equally apparent in uncut and continuous videotape presentations are, in our view, also adequately supported.[15] His further finding that the commercials themselves fail to reveal these features of

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[10] *Id.*, p. 9 [p. 698, herein].

[11] *Id.*

[12] *Id.*, pp. 12-41 [pp.700-721, herein].

[13] *Id.*, pp. 41-56 [pp. 722-733, herein], particularly p. 55 [p. 732, herein].

[14] *Id.*, p. 11 [p. 699, herein].

[15] "A videotape showing the spraying of Dry Ban on flat glass and the forearm of a person, and the results thereafter continuously over a five (5) minute period (tr. 790-96), was introduced into the record by complaint counsel

(*Continued*)

the product, however, rests on a much shakier foundation. In the film clips shown to the Commission on oral argument, for example, "pools" or puddles of liquid were readily visible and indeed appeared to have been *emphasized* in those ads by the action of the moving finger as it pushed through the areas sprayed with "Dry Ban."[16] Even if one assumes–as complaint counsel argue–that this liquid is considerably less apparent to the viewer on the *home* TV screen than on the larger projection equipment used in our hearing room,[17] it is hard to believe that an advertiser who was really intent on convincing a TV audience of the non-liquid character of his product would be unable to make a better showing of "dryness" than this.

Indeed, the learned law judge had similar problems with the purpose of the ads before him. On the one hand, he thought respondents had used the TV medium precisely because of its capacity to make the wet appear dry.[18] On the other hand, however, he declined to make a finding, as urged by complaint counsel, that respondents had shown a "specific intent" to deceive the public. First, a series of internal documents on the "dryness" issue[19] prepared by the advertising agency or its researchers suggested that the ads were designed to convince the viewer that the product was "clear" and "clean" only, *i.e.*, that, unlike competing products, it was "non-oily" and "non-greasy," characteristics that the public associates with anti-perspirants that are "sticky" and that stain clothing.[20] Secondly, the law judge thought it interesting that, if respondents were indeed intent on deceiving consumers as to the

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(CX Physical Exhibit 8)." Contrary to the demonstrations in respondent's 5 commercials exhibited on television, "this *uncut* and *continuous* portrayal clearly reveals to the viewer the wet, runny, liquid, and watery nature of Dry Ban when sprayed on the body or on a surface, as well as the plain and obvious residue deposited on the body or on a surface by such spraying. The residue left after spraying consists of the solid ingredients suspended in the liquid in the can (Sandland, tr. 1678, 1701-09). In sum, Dry Ban is wet and watery when applied to the body and remains wet for several minutes before drying, and upon drying leaves a substantial and visible residue." Initial decision, *supra*, p. 43 [p.723, herein]. (Emphasis in original.) Respondents' argument that all this "wetness" and "residue" would have been avoided if those holding the spray cans in these demonstrations had only held them at the proper angle is, to say the least, something less than compelling. If Dry Ban can in fact be sprayed on in such a way as to avoid causing the sprayed area to become wet or, after drying, to display a conspicuous residue, respondent could have easily instructed the law judge in the proper technique. Trials before administrative agencies are investigational inquiries, not sporting events staged by opposing counsel to test their litigative skills.

[16] Transcript of oral argument, *supra*, pp. 17-19, 30-31.

[17] *Id.*, p. 31.

[18] "The difference in appearance between Dry Ban and competing spray anti-perspirants formulated with an oil base was uniquely subject to a comparative demonstration *on film* which had the capacity to convey a false, misleading, and deceptive impression of the true physical characteristics of Dry Ban. A *live* comparative demonstration in which Dry Ban and an oil base competing spray anti-perspirant are sprayed in juxtaposition results in the perception of Dry Ban as watery, wet, and runny (CX 76; tr. 845-849)." *Id.*, p. 11. [p. 699 herein] (Emphasis in original.)

[19] *Id.*, p. 49, [p. 728 herein] *et seq.* While such an intent is of course not an essential ingredient of the offense charged here, it can be, as the law judge noted, highly relevant in interpreting the advertisements and in framing the necessary order, if any.

[20] *Id.*, pp. 49-53 [pp. 728-730 herein], especially p. 52 [p. 729 herein].

"dryness" of their product, they had neglected to include any questions along that line in their marketing test questionnaires.[21] Finally, he thought it strange that respondents, if they were really zeroing in on how "dry" their product was, would let their competition off so lightly in these commercials: "If respondents had a specific intent to misrepresent Dry Ban as dry and non-wet, it seems probable that the leading spray would have been shown wetter and runnier than it was."[22] Having gotten to the water's edge, however, the learned law judge declined to drink. He decided that respondents were guilty of "negligence, carelessness, and lack of judgment in use of the word 'dry' rather than a specific and calculated intent to mislead."[23]

Whatever the shortcomings of advertising agencies of the size and experience of this one–and there are those who believe they are many–negligence, carelessness, and lack of judgment in the choice of words have not been widely suspected. If there is any group of people anywhere that is thought to have a special expertise in using words that will convey precisely the message intended, it is the men who write advertisements for the country's major producers of highly-promoted consumer products. As counsel for Ogilvy & Mather argued before the Commission, "the intention [of these 5 ads] was to illustrate a readily observable product difference, that Dry Ban went on *clear*, while the leading competition went on with an *oily*, opaque appearance."[24] This product, with a relatively fast-drying alcoholic base, would naturally look clear–and therefore non-greasy and non-staining, the prime characteristics apparently desired by users of underarm deodorants–in any visual comparison with an *oil*-based deodorant. The leading competitive product, "Arrid," had such an oil-based formula and was therefore ideally suited to play the role of a brand X "heavy" in the campaign respondents had in mind, one designed to capitalize on the public's presumed preference for "clear" anti-perspirants rather than "oily" ones. The word "dry" was selected, in other words, to mean "non-greasy" (and thus non-staining) rather than anything so literal as "non-wet" or "non-liquid."[25]

This is also the common sense of the matter. Even if one believes in the power of television to convince the consumer that wet is really dry the first time around and thus in its power to sell each potential customer *one* can of the product in question, it would presumably strain the credulity of even the most enthusiastic of TV supporters to believe that *repeat* sales could be won-and market share thus maintained-through the instrument of any such self-evidently false claim. A "Dry Ban" customer standing in front of his TV set with a dripping armpit is not likely, one supposes, to go out and buy a second can of the stuff *if*, as complaint counsel seem to argue, it is a *literally* dry (non-liquid) anti-perspirant that he wants. Put another way, even a confirmed knave does not lie to the customer if (a) the lie is bound to be discovered and (b) one has to have repeat sales in order to survive. Both conditions being amply satisfied here-"Dry Ban" apparently foundered for a lack of new customers rather than a failure to keep old ones-the kind of misrepresentation challenged in this complaint would simply make no economic sense.

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[21] *Id.*, p. 53: [p. 730 herein]. If respondents intended to convey these representations, one would have thought that they would have been looking to see whether the demonstration in fact communicated them."

[22] *Id.*, p. 54. [p. 731 herein]

[23] *Id.*

[24] Transcript of oral argument, *supra*, p. 13.

[25] "All the contemporaneous documents, the research reports, the marketing plan presented to the client to gain its approval for the expenditures, all stated that the objective of the campaign was simply clarity." *Id.*, p. 13 .

It is always possible, of course, that an advertiser or his agency will be so obtuse as to try the impossible, *e.g.*, insist on trying to persuade the regular customer with a dripping armpit that it is really as dry as the Sahara. If so, however, the market itself is likely to administer a punishment that eminently fits the crime. Trying to keep repeat customers through the use of nonconcealable misrepresentations in regard to a product characteristic considered important by those customers is again not a sustainable practice and hence will be "voluntarily" abandoned without any assistance from the Federal Trade Commission. If these respondents have been quilty of this kind of economic folly, then, the most they could be reasonably charged with would be a brief and highly ineffective experiment in consumer deception, one that, in my view, was doomed at the start. Since there is obviously no public interest in spending the taxpayer's money to stop something that the market itself can be expected to kill before we can get it into court, I agree that the complaint should be dismissed.

I also believe, however, that this case was improvidently brought in the first place and that we ought to have the candor to say so publicly. Suppose, for example, that this record had fully supported complaint counsel's contention that these respondents had in fact entertained a "specific intent" to deceive the TV viewing public into believing that "Dry Ban" is dry in the literal sense of the word, *i.e.*, non-liquid. The fact would still remain, as noted above, that this industry lives on *repeat* business and hence that the commercials in question were inherently lacking in the *capacity* to mislead the consumer on this point beyond the point of the first purchase. This is not a case where a fly-by-night operator is attempting to gouge a thousand people out of a thousand dollars each (or a million people out of a dollar each) and then disappear into the economic woodwork. Had we given this industry even the most casual kind of *economic* diagnosis at the outset here, we would surely have spotted the basic unsoundness of this case.

But there is more. Having once issued this ill-advised complaint, why did we pursue the matter so doggedly? I recognize and fully support the sound principle of law that a "voluntary" abandonment of an unlawful practice after the Commission's hand is already on the offender's shoulder is not a valid reason for dismissing a case. But the rationale underlying that rule-that the practice, if profitable, will probably be resumed as soon as the law's hand is removed-has no application where, as here, the practice in question has proven itself unprofitable. These challenged advertisements were broadcast, as noted, during a 14-month period between July 21, 1969 and Sept. 11, 1970. Since those commercials cost Bristol-Myers $5.8 million and its sales of the product amounted to only $7.4 million and $7.9 million in 1969 and 1970, respectively, the firm undoubtedly lost money on "Dry Ban" during at least those two years. Its market share, we are told, has dropped from 3 percent to 1 percent over the entire period. The F.T.C. staff, having apparently been engaged in continuous investigation or negotiation of the case since early 1970, presumably knew that (a) the ads in question had not been broadcast since Sept. 1970 and (b) had been unsuccessful in increasing or even maintaining the product's share of the relevant economic market. We were nonetheless persuaded to issue a proposed complaint in, apparently, 1971. A year was then spent in an effort to get a "consent" order and, when that failed, we issued the instant complaint on Sept. 12, 1972, a full two years after the complained-of advertisements had been removed from the air. Now, nearly two *more* years later, we are finally about to stop spending the public's money on an effort that has never promised, so far as I can determine, public benefits of any kind.

I have grown weary of the kind of literal-minded legalisms we are confronted with in this matter. I don't believe there was any actionable consumer deception here and, if there was, I think it was too trivial to be worth pursuing by this agency. Surely we can find more important work for our legal staff than litigating the question of whether somebody's underarm deodorant is "dry" in the "non-liquid" sense or in the "non-oily" sense. I would dismiss all such cases as having been improvidently brought and direct our lawyers to get on with the serious business of stopping practices that are artificially inflating the prices and/or debasing the quality of the goods and services bought by our 200 million American consumers.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondents from the administrative law judge's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having concluded that the administrative law judge's initial decision should be set aside and that the complaint should be dismissed:

It is ordered, That the Administrative Law Judge's initial decision be, and it hereby is, set aside.

It is further ordered, That the complaint be, and it hereby is, dismissed.

Commissioner Nye not participating.

IN THE MATTER OF

MARYLAND CARPET OUTLET, INCORPORATED, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, TEXTILE FIBER PRODUCTS IDENTIFICATION AND TRUTH IN LENDING ACTS

Docket No. 8943. Complaint, Dec. 7, 1973-Decision, Apr. 22, 1975

Order requiring a Brooklyn Park, Md., seller, distributor, and installer of carpeting and floor coverings, among other things to cease using bait and switch tactics and other deceptive selling practices. Further, the order requires respondents to cease violating the Truth in Lending Act by failing to disclose to customers, in the extension of consumer credit, such information as is required by Regulation Z of the said Act and to cease violating the Textile Fiber Products Identification Act.

Appearances

For the Commission: *Everette E. Thomas, Richard C. Donohue*, and *Thomas J. Keary.*

For the respondents: *Jacob A. Stein, Stein, Mitchell and Mezines*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, the Truth in Lending Act and the implementing Regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Maryland Carpet Outlet, Incorporated, a corporation, and Allen R. Tepper, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, the implementing Regulation, and the Rules and Regulations promulgated under the Textile Fiber

Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Maryland Carpet Outlet, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 4328 Ritchie Hwy., Brooklyn Park, Md.

Respondent Allen R. Tepper is an individual and is the principal officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their places of business located in the State of Maryland, to purchasers thereof located in various other States of the United States and the District of Columbia, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor coverings, the respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, by advertisements transmitted over television and radio, and by oral statements and representations of their salesmen to prospective purchasers with respect to their products and services.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

PRE-HOLIDAY SALE
3 ROOMS
FIRST QUALITY

NYLON
WALL TO WALL
CARPET
$139

* * * * * * *

SALE
3 ROOMS OF LUXURIOUS
WALL TO WALL
NYLON CARPET
$159
INCLUDES INSTALLATION AND
SEPARATE HEAVY DUTY WAFFLE PADDING

* * * * * *

SALE
3 ROOMS
FIRST QUALITY
NYLON
WALL TO WALL
CARPET
$139

* * * * * * *

FREE!
HOOVER VACUUM CLEANER
WITH PURCHASE OF OUR
DELUXE 501 CARPET.
OVER 100 COLORS AND PATTERNS
IN STOCK FOR

IMMEDIATE INSTALLATION

* * * * * * *

FREE
KITCHEN CARPET
OR
VACUUM CLEANER
Up to 90 sq. ft. when
you purchase 3 rooms of
our deluxe 501 nylon carpet

* * * * * * *

OUR DECORATOR WILL BRING SAMPLES
DAY OR EVENING

* * * * * * *

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, the respondents have represented, and are now representing, directly or by implication, that:

1. Respondents are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements.

2. By and through the use of the words "SALE," "CLEARANCE," and other words of similar import and meaning not set out specifically herein, said respondents' carpeting and floor coverings may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices.

3. Purchasers of the said DeLuxe 501 Carpet receive a "free" vacuum cleaner or kitchen carpet.

4. By and through the use of the words "Over 100 colors and patterns in stock" and other words of similar import and meaning not set out specifically herein, the advertised carpeting is available in 100 different colors and patterns from which the prospective purchaser may choose.

5. By and through the use of the words "INCLUDING PADDING, INSTALLATION AND LABOR" and other words of similar import and meaning not set out specifically herein, all of the carpeting mentioned in such advertisements is installed with separate padding included at the advertised price.

6. By and through the use of the words "our decorator", and other words of similar import and meaning not set out specifically herein, respondents offer to the prospective customer the services of a trained and qualified interior decorator.

7. Certain of respondents' products are unconditionally guaranteed for various periods of time such as fifteen (15) years.

PAR. 6. In truth and in fact:

1. Respondents' offers are not bona fide offers to sell said carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of carpeting. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents or their salesmen, who make no effort to sell to the prospective customer the advertised carpeting. Instead, they exhibit what they represent to be the advertised carpeting which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced carpeting or floor coverings of superior quality and

texture are thereupon exhibited, which by comparison disparages and demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents, through their salesmen, attempt to sell and frequently do sell the higher priced carpeting.

2. Respondents' products are not being offered for sale at special or reduced prices. To the contrary, the price respondents regularly advertise and their so-called advertised "sale" price are identical and are used to mislead prospective customers into believing there is a saving from a bona fide regular selling price. In fact, seldom, if ever, are the advertised items sold, because the offer is designed to act as the inducement for the practices set forth in Paragraph Six 1., hereof.

3. Purchasers of respondents' DeLuxe 501 Carpet do not receive a free vacuum cleaner or free kitchen carpet. To the contrary, the cost of the "free" gift is added to and regularly included in the selling price of the merchandise sold to the customer.

4. The advertised carpeting is not available in 100 different colors and patterns from which the customer may choose. To the contrary, respondents have available only a very limited selection of colors and patterns.

5. A substantial portion of the carpeting advertised by the respondents is not installed with separate padding which is included in the advertised price. To the contrary, a substantial portion of the advertised carpeting has rubberized backing which is bonded to the carpeting.

6. Respondents do not employ or have available for their prospective customers a trained, qualified interior decorator. To the contrary, respondents' regularly employed salesmen, who do not have any special training in the art of decorating, are utilized as "decorators" by respondents.

7. Respondents' carpeting and floor coverings are not unconditionally guaranteed for the period of time orally represented by the respondents' salesmen. To the contrary, such written guarantees as they have provided to their customers were subject to conditions and limitations not disclosed in respondents' representatives' oral representations, and in a substantial number of instances customers did not receive a written guarantee.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents and their salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Six above, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

Therefore, the acts and practices as set forth in Paragraph Seven hereof were and are unfair and false, misleading and deceptive acts and practices.

PAR. 8. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents use the term "up to 270 sq. ft." to indicate the quantity of carpeting available at the advertised price.

PAR. 9. The unit of measurement usually and customarily employed in the retail advertising of carpet is square yards. Consumers are accustomed to comparing the price of carpet in terms of price per square yard, therefore, respondents' use of the square foot unit of measurement confuses consumers who compare respondents' prices with competitors' prices advertised on a square yard basis.

Furthermore, respondents use of square foot measurements exaggerates the size or quantity of carpeting being offered, and therefore has the capacity and tendency to mislead consumers into the mistaken belief they are being offered a greater quantity of carpet than is the fact.

Therefore, the acts and practices as set forth in Paragraph Eight hereof were and are unfair, false, misleading and deceptive.

PAR. 10. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and services of the same general kind and nature as those sold by respondents.

PAR. 11. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and

practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Textile Fiber Products Identification Act and the implementing rules and regulations promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 13. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products including carpeting and floor coverings and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 14. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and of the rules and regulations promulgated thereunder, in that they were falsely and deceptively advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

PAR. 15. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and to assist, directly or indirectly, in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the rules and regulations promulgated under said Act.

PAR. 16. Among such textile fiber products, but not limited thereto, was carpeting which was falsely and deceptively advertised in *The Washington Post* and *The Evening Star*, newspapers published in the District of Columbia, and having a wide circulation in the District of Columbia and various other States of the United States, in that said carpeting was described by such fiber connoting terms among which, but not limited thereto, was "Acrilan," and the true generic name of the fiber contained in such carpeting was not set forth.

PAR. 17. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder in the following respects:

1. In disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding, in violation of Rule 11 of the aforesaid rules and regulations.

2. A fiber trademark was used in advertising textile fiber products, without a full disclosure of the fiber content information required by said Act, and the regulations promulgated thereunder, in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid rules and regulations.

3. A fiber trademark was used in advertising textile fiber products, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of Rule 41(c) of the aforesaid rules and regulations.

PAR. 18. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, and unfair methods of competition, in commerce, under the Federal Trade Commission Act.

COUNT III

Alleging violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 19. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 20. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, have caused, and are causing, customers to execute binding retail installment contracts, hereinafter referred to as the "contract".

PAR. 21. By and through the use of the contract, respondents:

Fail to use the term "amount financed" to describe the amount of credit extended as required by Section 226.8(c)(7) of Regulation Z.

PAR. 22. In the ordinary course of their business as aforesaid, respondents have caused to be published, subsequent to July 1, 1969, advertisements of their goods and services, as "advertisement" is defined in Regulation Z. In the aforesaid advertisements respondents made and for some time last past have made, certain statements which aid, promote, or assist directly or indirectly in the extension of consumer credit and credit sales as "consumer credit" and "credit sales" are defined in Regulation Z, of which the following statements are illustrative, but not all inclusive:

NO MONEY DOWN
NO PAYMENT FOR 3 MONTHS

PAR. 23. By and through the use of the advertisements referred to in Paragraph 22 hereof, respondents represent, and have represented, directly or by implication, that no downpayment is necessary in connection with the extension of credit.

In truth and in fact, respondents usually and customarily require a downpayment, in violation of Section 226.10(a)(2) of Regulation Z.

PAR. 24. In the ordinary course of their business as aforesaid, respondents cause to be published advertisements of their goods and services, as "advertisement" is defined in Regulation Z. These advertisements aid, promote, or assist directly or indirectly extensions of consumer credit in connection with the sale of these goods and services. By and through the use of the advertisements, respondents:

Use the term "no money down," thereby implying no downpayment is required in connection with a consumer credit transaction, without also stating all of the following items in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

(i) the cash price;

(ii) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iii) the amount of the finance charge expressed as an annual percentage rate; and

(iv) the deferred payment price.

PAR. 25. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section

108 thereof, respondents have thereby violated the Federal Trade Commission Act.

Initial Decision by Raymond J. Lynch, Administrative Law Judge

DECEMBER 23, 1974

PRELIMINARY STATEMENT

On Dec. 7, 1973, the Federal Trade Commission issued a complaint in this proceeding alleging that the respondents Maryland Carpet Outlet, Incorporated, a corporation, and Allen R. Tepper, individually and as an officer of said corporation, violated the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, the Truth in Lending Act and the implementing regulations promulgated thereunder.

Respondents filed an answer to the complaint on Jan. 2, 1974, and subsequent thereto several prehearing conferences were held. The matter finally came on for hearing before the undersigned on Sept. 9, 10, 11 and 12, 1974. The parties filed their respective proposed findings of fact, conclusions of law and proposed order.

Any motions not heretofore or herein ruled on specifically are hereby denied.

The proposed findings, conclusions and briefs of the parties have been given careful consideration and to the extent not adopted in this initial decision in the form proposed, they are rejected as either not being supported by the evidence or as immaterial for determination of the issues in this proceeding.

Having considered the entire record in this proceeding, and having observed the witnesses who testified herein, together with the proposed findings, conclusions and orders submitted by the parties, the undersigned makes the following findings of fact.

FINDINGS OF FACT

1. Respondent Maryland Carpet Outlet, Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 4328 Ritchie Highway, Brooklyn Park, Md. (Admitted in Answer, Par. 1; Tr. 350-381).*

2. Respondent Allen R. Tepper is an individual and is the principal

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* References to the record are made in parentheses, and certain abbreviations are used as follows:

CX - Commission Exhibit

Tr. - Transcript page

(*Continued*)

officer of the corporate respondent. He formulates, directs and controls the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent (Admitted in Answer, Par. 1). Allen R. Tepper testified that he is vice president of the corporation (Tr. 350) and then he later testified that he may be president of the corporation (Tr. 378-379).

3. Mr. Tepper testified that he owned all the stock of the corporation (Tr. 350), and his duties and responsibilities as vice president of Maryland Carpet Outlet included taking care of the administrative work as well as the hiring and training of salesmen (Tr. 382). From 1966 through 1973, Maryland Carpet Outlet was managed on a day-to-day basis by Allen R. Tepper (Tr. 382-383).

4. Mr. Tepper testified that he employed an advertising agency at various times to do the advertising for Maryland Carpet Outlet (Tr. 89, 388).

5. Mr. Tepper also testified that he participated with the advertising agency in formulating the advertisements for Maryland Carpet Outlet, Inc. (Tr. 92, 388). In Respondents' Answer to Request for Admissions, Par. 1, Allen R. Tepper admits that the 212 representative samples of newspaper advertisements (CX A1-CX A106 and CX A109-CX A204) were placed in newspapers at his direction or with his knowledge. These aforementioned 212 newspaper advertisements encompass a period of time from July 1968 through June 1973.

6. Mr. Tepper further testified that he purchased carpet from various mills and suppliers (Tr. 392), and that he employed various different installers to install the carpet for Maryland Carpet (Tr. 390). In addition, Mr. Tepper testified that he trained the salesmen employed by Maryland Carpet, that he had a lot of contact with his salesmen, participated in sales meetings with his salesmen, and discussed sales techniques with them (Tr. 394-395). Mr. Tepper also stated in his testimony that either Mr. Tepper or whoever was the manager at the time would give final approval to all contracts negotiated by his salesmen (Tr. 398-399).

7. Maryland Carpet Outlet, Inc. was originally incorporated in 1959, but did not operate under the name Maryland Carpet Outlet until 1964 or 1965 (Tr. 351). Mr. Tepper testified that up until 1971, Maryland Carpet Outlet had branch offices (Tr. 351-352). One of the branch offices was located at 5648 Annapolis Road, Bladensburg, Md. (Tr. 352; CX A22-52, 75-106, 109-147, 150, 153-205, 206-216). This branch office is now a separate corporation called Maryland Virginia Carpet (Tr. 352).

References to testimony sometimes cite the name of the witness and the transcript page number without the abbreviation "Tr."

Upon questioning, Mr. Tepper attempted to explain the business connection between the two corporations (Maryland Carpet Outlet and Maryland Virginia Carpet) in this manner:

> Q. Is Maryland Virginia Carpet in any way related to Maryland Carpet Outlet?
> A. No.
> Q. How does Maryland Virginia Carpet advertise?
> A. How do they advertise?
> Q. Yes, under what name?
> A. In the newspapers.
> Q. Under what name?
> A. Maryland Carpet.
>
> JUDGE LYNCH: You just advertise as Maryland Carpet and use the Bladensburg Road address?
>
> THE WITNESS: Yes.
>
> JUDGE LYNCH: How does that square with the fact you say Maryland Virginia has nothing to do with Maryland Carpet?
>
> THE WITNESS: It once did, sir. It was one of our branches at one time, and we were advertising over there as Maryland Carpet. Then, Mr. Baron, who was working for me, at the time - we had an arrangement - I gave him 50 percent of the business if he would run it so we started a new corporation - we called it Maryland Virginia Corporation. The advertising just went on like that because we had been advertising as Maryland Carpet, but there was no other connection. The 2 companies are separate corporations. (Tr. 357-359).

8. Although Mr. Tepper tried to establish in his testimony that the branch office was now a separate corporation entity, it became apparent through not only his testimony, but the testimony of former salesmen and employees that Allen R. Tepper controlled all of the acts and practices of his branch office, Maryland Virginia Carpet, even after the corporate changeover (Tr. 352-353, 360-361).

9. Allen R. Tepper's responsibility for and control of the Maryland Virginia Carpet company can be further substantiated when viewed in relation to his control over the internal affairs of Maryland Virginia Carpet even after the corporate changeover. From Mar. 1970 to Jan. 1974, the general manager of the store at 5648 Annapolis Road in Bladensburg, Md., was Ann Marie Gittings (Tr. 123-124). During the time she worked there, Allen R. Tepper was the acknowledged owner (Tr. 129). During the time she worked there, Allen R. Tepper participated in the internal affairs of this corporation by hiring and firing people, exercising power over the determination of employees' salaries, and by having access to the financial accounts of the corporation. Mrs. Gittings testified as to these activities of Mr. Tepper as follows:

> Q. Who was the owner of the company you worked for?
> A. Allen R. Tepper. (Tr. 129)

10. When Maryland Virginia Carpet, Incorporated advertised, they did so under the name Maryland Carpet Outlet, Inc. (CX A109-147, 150, 154-205, 206-216). This even continued up until the present time, as can

be noted when viewing CX A206-216 which advertisements cover a time period up until Aug. 11, 1974. In these recent advertisements, nowhere can the name Maryland Virginia be found, only the name Maryland Carpet.

11. Maryland Carpet Outlet also functioned under the trade name Baltimore Carpet. Baltimore Carpet became a separate corporation on Dec. 7, 1973 (Tr. 375). Before that time, it was a subsidiary of Maryland Carpet Outlet, Inc. Allen R. Tepper testified as to the relationship between Maryland Carpet Outlet and Baltimore Carpet as follows:

Q. What is the relation of Baltimore Carpet to Maryland Carpet Outlet?

A. At the moment it is a corporation which is not being used at all. (Tr. 375)

12. The fact that Baltimore Carpet was nothing more than just a trade name for Maryland Carpet Outlet is further substantiated upon inspection of the financing documents of a consumer transaction between Baltimore Carpet and Mrs. Henry C. Prince. Although Mrs. Prince thought that she and her husband were entering into a transaction with Baltimore Carpet (Tr. 270), and the sales contract states that the contract is with Baltimore Carpet (CX B43), the receipt from the finance company, U.S. Life Credit Corporation (CX H27, p. 2), clearly shows that the assignor of the retail installment sales contract was Maryland Carpet Outlet, Inc. In summary, it is apparent that although Allen R. Tepper operated Maryland Carpet Outlet under various trade names and endeavored to set up separate corporations, he still directed and controlled all the retail carpet operations of these various companies for the benefit of himself and Maryland Carpet Outlet, Inc.

13. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public (Admitted in Answer, Par. 1; see also Tr. 381).

14. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their places of business located in the State of Maryland, to purchasers thereof located in various other States of the United States and the District of Columbia, and maintains and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted in Answer, Par. 1).

15. In 1968, respondents conducted quite a substantial course of trade in commerce, with gross sales of approximately $1.1 million (CX C2). Allen R. Tepper testified concerning the amount of sales generated by Maryland Carpet Outlet during 1973, and 1972 as follows:

Q. Could you give me an estimate then of your total sales volume for 1969, 1970, 1972 and 1973, if it is possible?

A. Last year was somewhere around $400,000 to $500,000. (Tr. 384)

16. Respondents are also in commerce by virtue of their advertising in Washington, D.C., area newspapers (CX G1-7; Respondents' Answer to Requests for Admissions, Par. 1). This newspaper advertising in papers of interstate circulation is further substantiated by the former advertising agent of Maryland Carpet Outlet, Inc., Bernard Sandler (Tr. 89-91).

17. Further, respondents are in commerce by virtue of the fact that they advertised on radio (CX G8; see also Respondents' Answer to Requests for Admissions, Par. 1) and television (Tr. 90; see also Respondents' Answer to Requests for Admissions, Par. 1; and also CX A108, pp. 1-25).

18. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor coverings, the respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, by advertisements transmitted over television and radio, and by oral statements and representations of their salesmen to prospective purchasers with respect to their products and services.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

PRE-HOLIDAY SALE
3 ROOMS
FIRST QUALITY
NYLON
WALL TO WALL
CARPET
$139
(CX A12, 60, 62, 64)

* * * * * * *

SALE
3 ROOMS OF LUXURIOUS
WALL TO WALL
NYLON CARPET
$159
INCLUDES INSTALLATION AND
SEPARATE HEAVY DUTY WAFFLE PADDING
(CX A51)

* * * * * * *

SALE
3 ROOMS

FIRST QUALITY
NYLON
WALL TO WALL
CARPET
$139
(CX 8, 9, 11, 37, 40, 95, 97)

* * * * * * *

FREE!
HOOVER VACUUM CLEANER
WITH PURCHASE OF OUR
DELUXE 501 CARPET.
OVER 100 COLORS AND PATTERNS
IN STOCK FOR
IMMEDIATE INSTALLATION
(CX A1, 3, 4, 6, 11, 13, 20)

* * * * * * *

FREE
KITCHEN CARPET
OR
VACUUM CLEANER
Up to 90 sq. ft. when
you purchase 3 rooms of
our deluxe 501 nylon carpet
(CX A109, 110, 111, 112, 122, 123)

* * * * * * *

OUR DECORATOR WILL BRING SAMPLES
DAY OR EVENING

(CX A1, 3, 4, 6, 12, 13, 15, 17, 23, 24, 25, 117, 140)

19. Respondents admit placing advertisements such as the above in newspapers (*on behalf of Maryland Carpet*) for the purpose of inducing the purchase of their carpet and floor coverings (Request for Admissions, Pars. 2, 3; admitted in Answer to Requests for Admissions, Par. 1). Respondents also admit that advertisements CX A1-106 and CX A109-204, from which the above have been taken are *representative samples* of newspaper advertisements caused to be published by Maryland Carpet during the time period July 1968 through June 1973 (Request for Admissions, Par. 1; admitted in Respondents' Answer to Requests for Admissions, Par. 1). Counsel supporting the complaint took notice of the fact that these advertisements were representative of the newspaper advertisements for the time period July 1968 to June 1973 in order to explain what the consumer witnesses had seen and had attracted them to Maryland Carpet's advertisements (Tr. 338-339).

20. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, the respondents have represented, and are now representing, directly or by implication, that:

a. Respondents are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements.

b. By and through the use of the words "SALE," "CLEARANCE," and other words of similar import or meaning not set out specifically herein, said respondents' carpeting and floor coverings may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices.

c. Purchasers of the said DeLuxe 501 Carpet receive a "free" vacuum cleaner or kitchen carpet.

d. By and through the use of the words "Over 100 colors and patterns in stock" and other words of similar import and meaning not set out specifically herein, the advertised carpeting is available in 100 different colors and patterns from which the prospective purchaser may choose.

e. By and through the use of the words "INCLUDING PADDING, INSTALLATION AND LABOR" and other words of similar import and meaning not set out specifically herein, all of the carpeting mentioned in such advertisements is installed with separate padding included at the advertised price.

f. By and through the use of the words "our decorator" and other words of similar import and meaning not set out specifically herein, respondents offer to the prospective customer the services of a trained and qualified interior decorator.

During the trial, the testimony of the consumers revealed the reasons for which they contacted the respondents after seeing respondents' advertisements (Jones 64-65; Earle 174, 176; Wyre 195; Bonge 293-294; Maslin 185; Tait 331; Blythe 308).

The interpretation of the statements contained in respondents' advertisements is left to the expertise of the administrative law judge. However, the fact that so many customers responded to the advertisement is evidence that these statements appeared to be bona fide offers.

g. Certain of respondents' products are unconditionally guaranteed for various periods of time such as fifteen (15) years.

21. Respondents' offers are not bona fide offers to sell said carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are

made for the purpose of obtaining leads to persons interested in the purchase of carpeting. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents or their salesmen, who make little or no effort to sell the prospective customer the advertised carpeting. Instead, they exhibit what they represent to be the advertised carpeting which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced carpeting or floor coverings of superior quality and texture are thereupon exhibited, which by comparison disparages and demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents, through their salesmen, attempt to sell the higher priced carpeting (Jackson 106, 110-111; Gittings 151; Smith 162-163; Maslin 186; Owens 224; Harris 281; Blythe 309; Thomas 324; Tait 332).

22. Not only was the appearance of the advertised carpet poor, but in many instances it was disparaged by the salesmen, either through comparison with more expensive carpeting or verbally (Earle 177; Maslin 187; Wyre 196; Harris 281; Thomas 324; Tait 333).

Upon cross examination by counsel for respondents, Mr. Earle testified:

> Q. You have told us what Mr. Vincenti told you about the comparison between the advertised carpet and the carpets that he had with him. Is that correct?
>
> A. Yes, that is correct. He immediately disparaged, after identifying it as the advertised carpeting, disparaged it, as to color, and said it would wear out very quickly. (Tr. 184)

Former salesman George Gittings stated in court:

> Q. Would you describe the color of the advertised carpeting?
>
> A. I carried Gold and Green.
>
> Q. Did you make any statements about the availability of colors of the advertised carpet?
>
> A. If a particular customer wanted red, I would say we didn't have that in stock.
>
> Q. This would be any color you did not carry, you did not have in stock?
>
> A. Right.
>
> Q. Once you had received the lead, would you describe what you would do next, at that point?
>
> A. I would call and verify that both the husband and wife would be home because you couldn't make a sale without both of their signatures or get it financed. I would go into the house, not bring any good carpeting with me, go in with the adv. sample, measure, draw the diagram, and I would say —— 9 times out of 10, it was more than the 270 feet advertised, which is a very short space, and the additional yardage over 30 yards, I would add that up and tell them how many square feet they had. Then, I would go in and show them the advertised carpet, and naturally, just to look at it would turn the customer off.
>
> Q. Would you describe the advertised carpeting?
>
> A. It was very flimsy, had no life to it.
>
> Q. Would you make a statement about durability of the advertised carpet?
>
> A. I would tell them there was no guarantee with it, none whatsoever, which there wasn't. It was a good buy for the amount of money, but there was no guarantee. I would state to them that mostly people who were in the Government, that were here on

temporary assignment, anywhere from 6 months to a year, buy this carpet, the purpose being they have no intention of becoming permanent residents. In their case, they was going to be permanent, and I was sure they would want something better.

Q. Did you ever make any sales of the advertised carpet?

A. The first year and a half or year, I was with them, I made one sale.

Q. Could you estimate the total number of sales you made during the period of your employment?

A. Of the advertised carpet?

Q. Of all carpeting?

A. I would have no idea. It was——maybe 3 or 4 hundred sales——I don't know. (Tr. 152-153)

23. Respondents' products are not being offered for sale at special or reduced prices. To the contrary, the price respondents regularly advertise and their so-called advertised "sale" price are identical and are used to mislead prospective customers into believing there is a saving from a bona fide regular selling price. In fact, seldom, if ever, are the advertised items sold, because the offer is designed to act as the inducement for the practices set forth above.

24. In Request for Admissions, Par. 16 (admitted by respondents in Answer to Request for Admissions, Par. 1), it is stated that the specific carpet advertised by Maryland Carpet in 1968 for "$139 for 3 rooms can be identified by the fiber trademark, El Camino." For the week of Oct. 27, 1968, 3 rooms of El Camino were advertised for $139 (CX A7). El Camino was also offered for $139 for the week of Nov. 3, 1968 (CX A8), likewise for the week of Nov. 10, 1968 (CX A10), and the week of Dec. 8, 1968 (CX A12). Yet for the week of Dec. 1, 1968 (CX A11), Maryland Carpet Outlet announced a "Sale" in which the sale carpeting (El Camino) was still offered for $139 for 3 rooms. There was no reduction in price at all during the week (CX A11) when Maryland Carpet was supposedly having a "sale."

This lack of reduction in price is further confirmed by the testimony of Allen R. Tepper. He testified as follows:

Q. Referring back to the advertisements, specifically Commission Exhibit A-11, you use the term, sale - December 1, 1968 advertisement - you advertise 3 rooms of carpeting for $139. You have already stated, in the admissions, during 1968, the sale carpeting was El Camino. Now, in the 2 months before that, you advertised El Camino for 3 rooms for $139, also, the same price. The week after your sale, you also offered El Camino for $139, and then for the month after that you offered El Camino for $139, and you used the term, clearance, for it. What do you mean by, sale, exactly?

A. To me, the term was used by the advertising agency because of what existed in the trade - everybody used the word, sale. To me it was just a word you use in advertising. I have been told since you are not supposed to do that and we don't do it.

Q. Did it constitute a reduction in your ordinary and customary selling price?

A. No. (Tr. 415-416)

A further example of this is that from the week of Jan. 19, 1969 to the week of June 1, 1969, Maryland Carpet Outlet advertised 3 rooms of carpet for $139 (CX A14 through 33), yet during the week of Jan. 26, 1969 (CX A15), they used the term "Clearance" to describe the 3 rooms for $139. During the week of Feb. 16, 1969 (CX A18), respondents used the term "Washington's Birthday Special" to describe the 3 rooms for $139. The same goes of the week of May 4, 1969, when the term "Spring Special" was used (CX A29) and the week of May 25, 1969 (CX A32), when the term "Memorial Day Special" was used to describe the 3 rooms for $139.

25. Purchasers of respondents' DeLuxe 501 Carpet do not receive a free vacuum cleaner or free kitchen carpet. To the contrary, the cost of the "free" gift is added to and regularly included in the selling price of the merchandise sold to the customer.

In CX A109, 110, 111, 112, 122, 123, for example, respondents advertise "Free Kitchen Carpet * * *." Yet, in CX D6, p. 1, a Commission and Par Sheet, Sept. 1, 1969, the instructions to the salesmen state:

> Monarch "Nice N' Easy" kitchen carpet will be our give-away up to 90 square feet or 10 square yards. You will be charged $8.00 per square yard off of the top or up to $80.00. Make sure this is reflected in the contract price. Any yardage the customer might need in addition to this, charge her $12.95 a square yard. You will always be charged at $8.00 per square yard, so if the customer needs more than 10 square yards, you can defer some of the cost of the give-away by selling her the additional yardage at $12.95 per square yard.
>
> There will never be a commission paid on Nice N' Easy that is sold as a give-away as $8.00 is our cost. If Nice N' Easy is sold as a separate job, it will be commissioned at the usual 3-5 or 10% as listed in the store selling prices.

Former salesman George Gittings testified concerning the giving of a free vacuum cleaner to customers who purchased the 501 carpet.

> Q. Who would pay for the vacuum, actually?
>
> A. It was the same vacuum you could buy for $23, and we were charging them $30. You added the $30 before you gave them the price of the carpet. (Tr. 157)

26. The advertised carpeting is not available in 100 different colors and patterns from which the customer may choose. To the contrary, respondents have available only a very limited selection of colors and patterns (Jackson 111; Gittings 152; Earle 177; Owens 230-231; Bonge 299-300; Tepper 407-408).

When former salesman James Smith was questioned concerning the availability of colors for the advertised carpeting, he testified as follows:

> Q. Would you tell me how many colors of the advertised carpet you carried?
>
> A. I believe it was about 4 at that time. (Tr. 163)

27. A substantial portion of the carpeting advertised by the respondents is not installed with separate padding which is included in the advertised price. To the contrary, a substantial portion of the advertised carpeting has rubberized backing which is bonded to the carpeting (Jackson 110; Smith 161; Tait 332; Blythe 309; Thomas 324; Tepper 409).

28. Respondents do not employ or have available for their prospective customers a trained, qualified interior decorator. To the contrary, respondents' regularly employed salesmen, who do not have any special training in the art of decorating, are utilized as "decorators" by respondents. Mr. Tepper admitted that there was no decorator training given the salesmen (Tr. 394).

29. Respondents' carpeting and floor coverings are not unconditionally guaranteed for the period of time orally represented by the respondents' salesmen. To the contrary, such written guarantees as they have provided to their customers were subject to conditions and limitations not disclosed in respondents' representatives' oral representations, and in a substantial number of instances customers did not receive a written guarantee (Tepper 414).

30. Although the guarantee was subject to conditions and limitations, in many cases this was not disclosed to the consumer by respondents' sales representatives in their oral presentation. This was especially true regarding disclosure of prorated condition of the guarantee (Jones 67; Wyre 197; Schaber 249; Prince 274; Harris 283; Thomas 327; Tait 335). The guarantee only applied to the nonsale carpeting (Tepper 415).

31. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents and their salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

32. All of the former salesmen called by the Commission testified that their sales were customarily made upon the first visit and that their sales presentations were directed to induce a customer to make their purchase upon the salesman's initial visit to the customer's home (Smith 166-167; Owens 233).

Salesman Jack K. Jackson testified:

> Q. Did you make any sales on the first visit to the customer?
>
> A. You didn't have to make a sale. It was a one shot deal. You walk in - if you can't go in and close it, then you are not much of a salesman. If you can't close it the first time, you won't close it the second or third.
>
> Q. Was your presentation directed to induce a customer to make a purchase on the first visit?

A. Yes. You went to the presentation and after the presentation you tried your best to close it* * *.(Tr. 112-113)

Salesman George Gittings testified:

Q. Did you ever make a sale upon the first visit to the customer?

A. Yes, that was the whole idea.

Q. What percentage of your sales were made on the first visit?

A. Of my sales?

Q. Yes.

A. 99 percent.

Q. Was your sales presentation then directed to inducing a purchase upon your first visit to the customer?

A. That is correct. (Tr. 153-154)

33. Evidence of the pressure by salesmen to secure a signed contract without giving the customer sufficient time to consider the purchase is further seen in consumer testimony such as that of Mrs. Henry C. Prince.

Q. Did you sign your contract for sale the same night the salesman was in your home?

A. Yes.

Q. Why did you sign it that night?

A. I didn't want to sign it that night because I figured he was there in our home and he knew what kind my husband and I liked, and I figured we would talk it over the next day and call him and let him know if that is the carpet we really wanted. I disagreed that night and that is when he completely ignored me. It was 20 after 9, and it was getting late, and he said he had another appointment, and he wanted us to sign it then.

Q. And the contract was signed that night?

A. Yes. (Tr. 274-275)

34. In the course and conduct of their business and for the purpose of inducing the purchase of their products, respondents use the term "up to 270 sq. ft." to indicate the quantity of carpeting available at the advertised price (see CX A3; CX A46; CX A51; CX A145; CX A204).

35. The unit of measurement usually and customarily employed in the retail advertising of carpet is square yards. Consumers are accustomed to comparing the price of carpet in terms of price per square yard, therefore, respondents' use of the square foot unit of measurement confuses consumers who compare respondents' prices with competitors' prices advertised on a square yard basis. Furthermore, respondents' use of square foot measurements exaggerates the size or quantity of carpeting being offered, and therefore has the capacity and tendency to mislead consumers into the mistaken belief they are being offered a greater quantity of carpet than is the fact.

Respondents admitted that the unit of measurement most commonly employed in the retail carpet trade is square yards in Answer to Request for Admissions, Par. 1. Respondents went on in Answer to Requests for Admissions, Par. 1, to admit that manufacturers or suppliers from whom Maryland Carpet purchases carpet, sell such carpet by the square yard.

36. The use by respondents of the aforesaid false, misleading and

deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief (see Findings 1 - 35).

37. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products including carpeting and floor covering and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

In Respondents' Answer to the Complaint, Par. 1, respondents have admitted to having been engaged in "commerce" as defined in the Federal Trade Commission Act (52 Stat. 111; 15 U.S.C. 44, Section 4) and, by virtue of Section 7(b) of the Textile Fiber Products Identification Act (72 Stat. 1721; 15 U.S.C. 70 e), having been engaged in "commerce" as defined by Section 2(k) of the same Act (72 Stat. 1717; 15 U.S.C. 70). Further, in Respondents' Answer to the Complaint, Par. 1, respondents did admit to the offering for sale, sale, distribution and installation of carpeting and floor covering to the public. It is manifest with regard to representation of respondents in their advertising of carpeting and floor covering that respondents merchandise is a "textile fiber product" as defined by Section 2(g) and (h) of the Textile Fiber Products Identification Act (72 Stat. 1717, 15 U.S.C. 70). See CX A1 through CX A204 for copies of respondents' advertising.

38. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and of the rules and regulations promulgated thereunder, in that they were falsely and deceptively advertised, or otherwise identified as to the name or amount of constituent fibers contained therein (Admitted in Answer, Par. 6).

39. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and to assist, directly or indirectly, in the sale or offering for sale of said products, failed to set

forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the rules and regulations promulgated under said Act (Admitted in Answer, Par. 6).

40. Among such textile fiber products, but not limited thereto, was carpeting which was falsely and deceptively advertised in *The Washington Post* and *The Evening Star*, newspapers published in the District of Columbia, and having a wide circulation in the District of Columbia and various other States of the United States, in that said carpeting was described by such fiber connoting terms among which, but not limited thereto, was "Acrilan," and the true generic name of the fiber contained in such carpeting was not set forth (Admitted in Answer, Par. 6).

41. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder in the following respects:

a. Failure to disclose the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding, in violation of Rule 11 of the aforesaid rules and regulations.

b. A fiber trademark was used in advertising textile fiber products, without a full disclosure of the fiber content information required by said Act, and the regulations promulgated thereunder, in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid rules and regulations.

c. A fiber trademark was used in advertising textile fiber products containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of Rule 41(c) of the aforesaid rules and regulations.

(Admitted in Answer, Par. 6)

42. Moreover, certain of the advertising of respondents regarding carpeting or floor covering set forth information as to fiber content of the floor covering or carpeting, which carpeting contained a backing, filling or padding. Such information was incomplete in that it failed to indicate that the information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding,

as is required by the Commission's Rules and Regulations under the Textile Fiber Products Identification Act (Title 16 C.F.R. Section 303.11). Statements in advertising constituting violations of the aforesaid Rule and thereby constituting a misbranding within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act (72 Stat. 1719; 79 Stat. 124; 15 U.S.C. 70 b), include but are not limited to "First Quality Wall-to-Wall Nylon Carpet" (see CX A37 through CX A47 and CX A57 through CX A101).

43. In certain of the advertisements of respondents, the term "Acrilan" was used in reference to carpeting advertised therein without setting forth the generic name of the fiber, as required by Section 4(c) of the Textile Fiber Products Identification Act (see CX A46 through CX A49 and CX A100 through CX A103).

44. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System (Admitted in Answer, Par. 7; Tepper 404).

45. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, have caused, and are causing, customers to execute binding retail installment contracts, hereinafter referred to as the "contract" (Admitted in Answer, Par. 7).

46. The fact that respondents use retail installment contracts in the financing of carpeting was further admitted in the testimony of respondent Allen Tepper (Tr. 404) and copies of unexecuted retail installment contracts used by respondents were introduced in evidence (CX F2, CX F3, CX F4, CX F5, CX F6, CX F7, CX F8; Tr. 404).

47. By and through the use of contract, respondents failed to use the term "amount financed" to describe the amount of the credit extended as required by Section 226.8(c)(7) of Regulation Z (Admitted in Answer, Par. 7; see also CX H14, CX H15, CX H18, CX H19, CX H20, CX H23, which are copies of executed conditional sales contracts (Tr. 405-406)).

48. In the ordinary course of their business as aforesaid, respondents have caused to be published, subsequent to July 1, 1969, advertisements of their goods and services as "advertisement" is defined in Regulation Z. In the aforesaid advertisements respondents made, and for some time last past have made, certain statements which aid, promote, or assist, directly or indirectly, in the extension of consumer credit and credit sales as "consumer credit" and "credit sales" are defined in Regulation Z, of which the following statements are illustrative, but not all inclusive:

NO MONEY DOWN
NO PAYMENT FOR 3 MONTHS

(Admitted in Answer, Par. 7)

49. By and through the use of the advertisements referred to herein, respondents represent, and have represented, directly or by implication, that no downpayment is necessary in connection with the extension of credit.

In truth and in fact, respondents usually and customarily require a downpayment, in violation of Section 226.10(a)(2) of Regulation Z (Admitted in Answer, Par. 7).

50. In the ordinary course of their business as aforesaid, respondents cause to be published advertisements of their goods and services, as "advertisement" is defined in Regulation Z. These advertisements aid, promote, or assist, directly or indirectly, extensions of consumer credit in connection with the sale of these goods and services. By and through the use of the advertisements, respondents: use the term "no money down," thereby implying no downpayment is required in connection with a consumer credit transaction, without also stating all of the following items in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

(i) the cash price;

(ii) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iii) the amount of the finance charge expressed as an annual percentage rate; and

(iv) the deferred payment price.

(Admitted in Answer, Par. 7)

See also CX A48, CX A49, CX A102, CX A103 for examples of the advertising of respondents (Tr. 386).

For evidence of the fact that respondents usually and customarily require a downpayment, see copies of executed retail installment contracts CX H3 through CX H26 (Tr. 405-406).

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Maryland Carpet Outlet, Inc., a corporation, and Allen R. Tepper, individually and as an officer of said corporation.

2. Said respondents have at all times relevant hereto been engaged in interstate commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

3. The aforesaid acts and practices of respondents, as herein found, were and are, all to the prejudice and injury of the public and of

respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

4. Pursuant to Section 7(a) and (b) of the Textile Fiber Products Identification Act, respondents' failure to comply with the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, and unfair methods of competition in commerce, under the Federal Trade Commission Act.

5. Pursuant to Section 103(q) of the Truth in Lending act, respondents' failures to comply with the provisions of Regulation Z constitute violations of that Act, and pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

LEGAL FINDINGS

Under the *Crowell-Collier* test for interstate commerce jurisdiction (*Crowell-Collier Publishing Company, et al.*, 75 F.T.C. 291 (1969)), corporate respondent qualifies because of the shipments of merchandise from the Maryland Carpet Outlet warehouse in the State of Maryland to customers located in Virginia and the District of Columbia.

In addition to interstate shipments of merchandise, Maryland Carpet Outlet, Inc. has advertised in several newspapers of interstate circulation and television and radio stations having sufficient power to broadcast across state lines. In *Ford Motor Company* v. *FTC*, 120 F.2d 175 (1941), the interstate distribution of advertising by an intrastate credit corporation was sufficient to support Section 5 jurisdiction. Similarly, in *Guziak* v. *FTC*, 1966 Trade Cases ¶ 71,794, the Court held that it did not appear to be necessary for jurisdictional purposes that there be any sales attributable to the interstate advertising. The Court noted that, while involved in defining Federal Trade Commission powers under Section 5, a Senate Committee had stated, "Since the powers of the Commission in this respect are injunctive rather than punitive, (it) should have the power to restrain an unfair act before it becomes a method of practice * * *." S. Rep. No. 221, 75th Cong., 1st Sess., 3-4 (1937). This view is in accord with that taken by the Court in *Morton, Inc.* v. *FTC*, 286 F.2d 158 (1961), a Fur Products Labeling Act case also dealing with the "in commerce" question in which it was held that interstate advertising would give the Commission jurisdiction despite the fact that all sales were intrastate.

If the customer pays for the "free" merchandise or service because it is included in the total price, then it is not free. In other words, if the cost of the "free" item is regularly included in the price of the merchandise, the use of the term is deceptive *Sunshine Art Studios, Inc., et al., aff'd* 481 F.2d 1171 (1st Cir. 1973).

In determining the impression created by an advertisement, the Commission need not look to the technical interpretation of each phrase but must look to the overall impression likely to be made on the consuming public. *Murray Space Shoe Corporation* v. *FTC*, 304 F.2d 270 (2d Cir. 1962). In *National Bakers Services, Inc.* v. *FTC*, 329 F.2d 365 (7th Cir. 1964), the Court said "The important criterion in determining the meaning of an advertisement is the net impression that it is likely to make on the general populace."

It is not essential that the Commission find actual deception to support its complaint when the representations have the capacity to deceive. *Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F.2d 676 (2d Cir. 1944). In *FTC* v. *Standard Education Society, et al.*, 302 U.S. 112 (1937), the Court said the fact that a representation "may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced."

The Commission's expertise to interpret representations and determine their capacity to deceive the consuming public has long been upheld. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

The use of deceptive advertising to obtain prospects for the sale of merchandise other than that advertised has perhaps been one of the most frequently challenged practices violative of Section 5 of the Federal Trade Commission Act. "Guides Against Bait Advertising" issued in 1959, 4 CCH Trade Reg. Rep., ¶ 39,011.

It is not essential to show evidence of disparagement of the advertised product to find "bait and switch". The Commission may infer that customers were "switched from the advertised product by evidence of bait advertising and minimal sales of the advertised product." *Tashof* v. *FTC*, 437 F.2d 707 (D.C. Cir. 1970); *Giant Food Inc.* v. *FTC*, 322 F.2d 977 (1963), *cert. denied*, 376 U.S. 967 (1964).

In this instance, the purchase and sale of the advertised product in minimal. This fact in combination with the poor appearance of the product, disparagement of the product by the salesmen, lack of economic feasibility of sale, and the lack of incentive to sell the advertised product, as well as the advertisements themselves, evidence a bait and switch selling scheme.

The erroneous implication created by respondents that their advertised prices constitute a drastic reduction from their regular prices is in practice similar to that condemned by the Commission in *Giant Food, Inc.* v. *FTC*, 61 F.T.C. 326 (1962). In that case, the Commission found that respondents were making savings claims by comparing their "Super Giant Low Price" which was actually their regular selling price with a fictitious "Manufacturers Suggested Price" or "Regular Price." The Commission ordered Giant to refrain from:

> Representing in any manner that, by purchasing any of its merchandise, customers are afforded savings amounting to the difference between respondent's stated selling price and any other price used for comparison with that selling price, unless the comparative price used represents the price at which the merchandise is usually and customarily sold at retail in the trade area involved, or is the price at which such merchandise has been usually and regularly sold by respondent at retail in the recent, regular course of its business. (p. 362)

Although the practice of the respondents in the instant case differs from that of *Giant*, the effect on consumers is the same in that they are led to believe that substantial savings from the regular price are available if they purchase carpet during respondents' "sale" or "jubilee" or "carnival," when, in fact, there is no saving.

It is an unfair trade practice to offer an unconditional guarantee in an advertisement or on a customer contract or by oral statement when, in fact, there are undisclosed conditions on the terms of the actual guarantee. The Commission's "Guides Against Deceptive Advertising of Guarantees", 16 C.F.R. 429 (promulgated 4/26/60), apply to guarantees "however made, i.e., in advertising or otherwise." The same disclosures have been required when offering guarantees which have conditions or limitations. *Coro, Inc.* v. *FTC*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Benrus Watch Co.* v. *FTC*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966).

The Commission has determined that its orders should prevent not only the initial deceptive contact through a bait and switch scheme, but should go further to prevent the subsequent manipulation of a customer by high-pressure tactics which preclude a careful consideration of the entire transaction, free from the influence of deceptive sales techniques. *Household Sewing Machine Co., Inc., et al.*, 76 F.T.C. 207 (1956). *FTC* v. *National Lead Co.*, 352 U.S. 419 (1956).

The Remedy

As previously stated herein, the parties filed briefs and recommended the nature of the sanction to be imposed. It is the contention of counsel supporting the complaint that in order to protect the public interest, corrective advertising such as that set forth in the complaint must be issued:

> The Federal Trade Commission has found that we engage in bait and switch advertising; that is, the salesman makes it difficult to buy the advertised product and he attempts to switch you to a higher priced item.

The respondents, on the other hand, contends that Section 5 of the Federal Trade Commission Act in no way gives the Commission the power to issue an order requiring "the respondents [to] devote a certain portion of their future advertising to a confession and admission that they have been found by the Federal Trade Commission to have engaged in 'Bait and Switch' tactics." The respondents argue that the recommended remedy is unconstitutional and the taking of property without just compensation. Furthermore, that the public interest does not require an order of such broad scope.

The Commission is vested with broad discretion in determining the type of order necessary to ensure discontinuance of the unlawful practices found. *FTC* v. *Colgate-Palmolive Co., supra* at 392. The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 613 (1946); *Niresk Industries, Inc.* v. *FTC*, 278 F.2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883. It is well settled that the Commission may require affirmative statements in advertising where failure to make such statements leaves the prospective consumer without all the material facts on which to base his choice as to whether to do business with the advertiser or purchase the product advertised. *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

The position of the Commission with respect to corrective advertising has been set forth very clearly in *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 471, where the Commission held that:

> An order requiring corrective advertising is well within the arsenal of relief provisions which the Commission may draw upon in fashioning effective remedial measures to bring about a termination of the acts or practices found to have been unfair or deceptive. If such relief is warranted to prevent continuing injury to the public, it is neither punitive nor retrospective.
>
> Corrective advertising orders where necessary and appropriate will violate neither the letter nor the spirit of the First Amendment guarantees of free speech and press and are clearly within the remedial authority of the Commission.

Subsequently, the Commission had occasion to reiterate the theories in *ITT Continental Baking Co. Inc.*, F.T.C. Docket No. 8860, wherein it stated:

> We have further evidence that many months after conclusion of the advertising campaign a small percentage of consumers recall the nutritional advertising of respondents though it is not clear from this evidence to what extent those consumers continued to believe that Wonder Bread is an extraordinary food (the misrepresentation found to have been made * * * we cannot find in the record a sufficient basis upon which to conclude that corrective advertising is needed to eliminate the misrepresentation found.

In addition, the Commission has also set forth its position with respect to the imposition of sanctions in both the *Curtis Publishing Company* case, Docket No. 8800, and the *Universal Credit Acceptance Company* case, Docket No. 8821, wherein they very emphatically decided that even in a case of what was deemed restitution, they had the power to, and indeed did in *Universal Credit, supra,* impose an order which was referred to throughout as restitutionary relief. The Commission was reversed in *Universal Credit* by the Ninth Circuit Court of Appeals. However, in *Holiday Magic, Inc.*, Docket No. 8834 [84 F.T.C. 748], the Commission continues to claim the power to order relief as set forth in *Universal Credit*.

Taking into consideration all of the cases that have come before, and the Commission's repeatedly stated position, the undersigned is of the opinion that he is bound by the precedent that has already been established by the Commission.

Therefore, the undersigned concludes that as a result of the respondents' activities, the request of counsel supporting the complaint for corrective advertising is not beyond the scope of the Commission's power, and that in order to stop the respondents and deter others from engaging in acts and practices as set forth herein, the corrective advertising provision of the Commission's order should be imposed. The facts in this case, in the opinion of the administrative law judge, constitute fraud to such a degree that respondents should be stopped by whatever means possible from defrauding the public. Therefore, an order will issue as recommended by counsel supporting the complaint even though the Commission took a different view in *Wilbanks Carpet Specialists, Inc., et al.*, Docket No. 8933 [84 F.T.C. 510]

ORDER

I

It is ordered, That respondents Maryland Carpet Outlet, Incorporated, a corporation, its successors and assigns, and its officers, and Allen R. Tepper, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of carpeting and floor coverings, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of carpeting or other merchandise or services.

2. Making representations, directly or indirectly, orally or in writing, purporting to offer merchandise or services for sale when the purpose of the representation is not to sell the offered merchandise or services but to obtain leads or prospects for the sale of other merchandise or services at higher prices.

3. Advertising or offering merchandise or services for sale when the advertised merchandise or services is inadequate for the purposes for which it is offered.

4. Discouraging or disparaging in any manner the purchase of any merchandise or services which are advertised or offered for sale.

5. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price; and

c. a computation of the net profit from the sales of each advertised product or service at the advertised price.

6. Advertising the price of carpet, either separately or with padding and installation included, for specified areas of coverage without disclosing in immediate conjunction and with equal prominence the square yard price for additional quantities of such carpet with padding and installation needed.

7. Representing, directly or indirectly, orally or in writing, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

8. Using the words "Sale," "Clearance," "Pre-Holiday Sale," or any other word or words of similar import or meaning not set forth specifically herein, unless the price of such merchandise or service being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise or service was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business.

9. (a) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such merchandise or services have been sold or offered for sale in good faith at the former price by respondents for a reasonably substantial period of time in the recent, regular course of their business.

(b) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise or services in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise or services at the compared price or some higher price.

(c) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise or services, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in their trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise or services of like grade and quality.

10. Failing to maintain and produce for inspection or copying, for a period of three years, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations as set forth in Paragraphs Eight and Nine of this order are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

11. Representing, directly or indirectly, orally or in writing, that any price amount is respondents' regular price for any article of merchandise or service unless said amount is the price at which such merchandise or service has been sold or offered for sale by respondents for a reasonably substantial period of time in the recent, regular course of their business and not for the purpose of establishing fictitious higher prices upon which a deceptive comparison or a "free" or similar offer might be based.

12. Representing, directly or indirectly, orally or in writing, that a purchaser of respondents' merchandise or services will receive a "free" vacuum cleaner or kitchen carpeting or any other "free" merchandise, service, prize or award unless all conditions, obligations, or other prerequisites to the receipt and retention of such merchandise, services, gifts, prizes or awards are clearly and conspicuously disclosed at the outset in close conjunction with the word "free" wherever it first appears in each advertisement or offer.

13. Representing, directly or indirectly, orally or in writing, that any merchandise or service is furnished "free" or at no cost to the purchaser of advertised merchandise or services, when, in fact, the cost of such merchandise or service is regularly included in the selling price of the advertised merchandise or service.

14. Representing, directly or indirectly, orally or in writing, that a "free" offer is being made in connection with the introduction of new

merchandise or services offered for sale at a specified price unless the respondents expect, in good faith, to discontinue the offer after a limited time and commence selling such merchandise or service, separately, at the same price at which it was sold with a "free" offer.

15. Representing, directly or indirectly, orally or in writing, that merchandise or service is being offered "free" with the sale of merchandise or service which is usually sold at a price arrived at through bargaining, rather than at a regular price, or where there may be a regular price, but where other material factors such as quantity, quality, or size are arrived at through bargaining.

16. Representing, directly or indirectly, orally or in writing, that a "free" offer is available in a trade area for more than six (6) months in any twelve (12) month period. At least thirty (30) days shall elapse before another such "free" offer is made in the same trade area. No more than three such "free" offers shall be made in the same area in any twelve (12) month period. In such period, respondents' sale in that area of the product or service in the amount, size or quality promoted with the "free" offer shall not exceed 50 percent of the total volume of its sales of the product or service, in the same amount, size or quality, in the area.

17. Representing, directly or indirectly, orally or in writing, that a product or service is being offered as a "gift," "without charge," "bonus," or by other words or terms which tend to convey the impression to the consuming public that the article of merchandise or service is free, when the use of the term "free" in relation thereto is prohibited by the provisions of this order.

18. Representing, directly or indirectly, orally or in writing, that respondents have "over 100" or any other number of patterns and colors of carpeting in stock unless respondents have the stated number of patterns or colors in stock and available for immediate sale and delivery; or misrepresenting, in any manner, the colors, patterns, size, kind or quantity of carpeting in stock and available for sale, delivery or installation.

19. Representing, directly or indirectly, orally or in writing, that a stated price for carpeting or floor coverings includes the cost of a separate padding and the installation thereof, unless in every instance where it is so represented the stated price for floor covering does, in fact, include the cost of such separate padding and installation thereof; or misrepresenting in any manner, the prices, terms or conditions under which respondents supply separate padding in connection with the sale of floor covering products.

20. Representing, directly or indirectly, orally or in writing, that respondents employ or have available for their prospective customers a

trained, qualified interior decorator; or misrepresenting in any manner, the training or qualifications of any of respondents' employees, agents, or representatives.

21. Representing, directly or indirectly, orally or in writing, that any product or service is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and respondents deliver to each purchaser a written guarantee clearly setting forth all of the terms, conditions and limitations of the guarantee fully equal to the representations, directly or indirectly, orally or in writing, made to each such purchaser, and unless respondents promptly and fully perform all of their obligations and requirements under the terms of each such guarantee.

22. Contracting for any sale whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

23. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

24. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

[enter date of transaction]

____

(date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [*Name of seller*], AT [*address of seller's place of business*], NOT LATER THAN MIDNIGHT OF [*date*].

I HEREBY CANCEL THIS TRANSACTION.

____

(Date)

____

(Buyer's signature)

25. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

26. Including in any sales contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

27. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

28. Misrepresenting, directly or indirectly, orally or in writing, the buyer's right to cancel.

29. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

30. Negotiating, transferring, selling, or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

31. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

32. Advertising any carpeting or floor covering using a unit of measurement not usually and customarily employed in the retail advertising of carpeting or which tends to exaggerate the size or quantity of carpeting or floor covering being offered at the advertised price.

Provided, however, That nothing contained in Part I of this order shall relieve respondents of any additional obligations respecting contracts required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent, respondents can apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon proper showing, shall make such modifications as may be warranted in the premises.

II

It is further ordered, That respondents Maryland Carpet Outlet, Incorporated, a corporation, its successors and assigns, and its officers, and Allen R. Tepper, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

B. Falsely and deceptively advertising textile products by:

1. Making any representations by disclosure or by implication, as to fiber content of any textile fiber product in any written advertisement which is used to aid, promote or assist, directly or indirectly, in the sale, or offering for sale, of such textile fiber product unless the same information required to be shown on the stamp, tag, label or other means of identification under Sections 4(b)(1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Failing to set forth in advertising the fiber content of floor covering containing exempted backings, fillings or paddings, that such disclosure relates only to the face, pile or outer surface of such textile fiber products and not to the exempted backings, fillings or paddings.

3. Using a fiber trademark in advertising textile fiber products without a full disclosure of the required fiber content information in at least one instance in said advertisement.

4. Using a fiber trademark in advertising textile fiber products containing only one fiber without such fiber trademark appearing at least once in the advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type.

III

It is further ordered, That respondents Maryland Carpet Outlet, Incorporated, a corporation, its successors and assigns, and its officers, and Allen R. Tepper, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with any extension of consumer credit or advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in

Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

2. Representing, directly or indirectly, orally or in writing, that no downpayment will be required unless respondents usually and customarily accept no downpayment, in accordance with Section 226.10(a)(2) of Regulation Z.

3. Representing, directly or indirectly, in any advertisement as "advertisement" is defined in Regulation Z, the amount of the downpayment required or that no downpayment is required, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following terms are stated in terminology prescribed under Section 226.8 of Regulation Z:

(i) the cash price;

(ii) the amount of the downpayment required or that no downpayment is required, as applicable;

(iii) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iv) the amount of the finance charge expressed as an annual percentage rate; and

(v) the deferred payment price.

4. Failing in any consumer credit transaction or advertisement to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That each of respondents do forthwith cease and desist from disseminating, or causing the dissemination of, any advertisement of merchandise by means of newspapers, or other printed media, television or radio, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, unless respondents clearly and conspicuously disclose in each advertisement the following notice set off from the text of the advertisement by a black border:

> **The Federal Trade Commission has found that we engage in bait and switch advertising; that is, the salesman makes it difficult to buy the advertised product and he attempts to switch you to a higher priced item.**

One year from the date this order becomes final or any time thereafter, respondents upon showing that they have discontinued the practices prohibited by this order and that the notice provision is no longer necessary to prevent the continuance of such practices may petition the Commission to waive compliance with this order provision.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor coverings and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of carpeting or floor coverings, or to advertise, promote, or sell carpeting or floor coverings and other merchandise, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale, sale of any product, consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent, Allen R. Tepper, promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

OPINION OF THE COMMISSION

APRIL 22, 1975

BY HANFORD, *Commissioner*

Respondents appeal from that part of the order entered by the administrative law judge constituting a "consumer warning" requirement, which provides that respondents must include the following disclosure in all of their advertisement:

> The Federal Trade Commission has found that we engage in bait and switch advertising; that is, the salesman makes it difficult to buy the advertised product and he attempts to switch you to a higher priced item.

This is the sixth time within the past year that we have been faced with the question of whether such a warning is justified in a contested carpet bait and switch case. In each of the five earlier instances, we determined that the record did not support such a requirement.[1] In framing his order, Administrative Law Judge Lynch took into account this Commission position, but nevertheless ordered consumer warning relief here because he believed that "the facts in this case* * * constitute fraud to such a degree that respondents should be stopped by whatever means possible from defrauding the public."[2] We have reviewed the record in this proceeding with care and find nothing exceptional about the conduct of these respondents when compared with the conduct of respondents in the five earlier proceedings. Fraud is the essence of bait and switch. To the extent that it was present here, it was also present in the earlier cases in which we declined to order consumer warning relief. Therefore we find it necessary to delete Judge Lynch's "consumer warning" from the order. This determination is, of course, without prejudice to the Commission's right to reopen this proceeding to consider the imposition of a "consumer warning" requirement, or to seek imposition of such relief in a civil penalty action against respondents,[3] should their future conduct warrant either course of action.

In all other respects, the order of the administrative law judge is affirmed.

FINAL ORDER

This matter has come before the Commission on the motion of respondents for consideration of the question whether the consumer warning provision ordered by the administrative law judge should be adopted as part of the Commission's cease and desist order. The Commission has determined that this matter is indistinguishable from the matters of *Wilbanks Carpet Specialists, Inc., et al.*, Docket 8933 [84 F.T.C. 510], *Tri-State Carpets, Inc., et al.*, Docket 8945 [84 F.T.C. 1078], *Theodore Stephen Co., Inc., et al.*, Docket 8944 [85 F.T.C. 152], *Sir Carpet, Inc., et al.*, Docket 8981 [85 F.T.C. 190], and *Freight Liquidators, Inc., et al.*, Docket 8937 [85 F.T.C. 274], inasmuch as the record presents insufficient evidence that a consumer warning is a necessary or appropriate means for the termination of the acts or practices complained of or for the prevention of their recurrence. Having declined to order a consumer warning in the five earlier matters, the Commission has concluded that the same disposition is warranted herein.

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[1] Wilbanks Carpet Specialists, Inc., *et al.*, Docket 8933 (Sept. 24, 1974 [84 F.T.C. 510]), Tri-State Carpets, Inc., *et al.*, Docket 8945 (October 15, 1974 [84 F.T.C. 1078]), Theodore Stephen Co., Inc., *et al.*, Docket 8944 (Jan. 28, 1975 [85 F.T.C. 152]), Sir Carpet, Inc., *et al.*, Docket 8981 (Feb. 6, 1975 [85 F.T.C. 190]), Freight Liquidators, Inc., *et al.*, Docket 8937 (Feb. 25, 1975 [85 F.T.C. 274]).

[2] Initial decision at 31 [p. 783, herein].

[3] Section 5(1) of the Federal Trade Commission Act (15 U.S.C. Sec. 45(1)) empowers district courts hearing civil penalty actions "to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of * * * final orders of the Commission."

Accordingly, the initial decision issued by the judge should be modified in accordance with the foregoing views of the Commission, and as so modified, adopted as the decision of the Commission.

It is ordered, That the initial decision issued by the administrative law judge be modified by striking therefrom the following:

> Those portions of the conclusions of law which concern "consumer warning" relief (at pp. 29-31 *sub nom. "THE REMEDY"*); and the first "FURTHER ORDERED" paragraph of Part III of the order to cease and desist issued by the judge (at pp. 51-52).

As so modified, the initial decision is hereby adopted.

IN THE MATTER OF

SOUNDTRACK CHEVELL INDUSTRIES, INC., ET AL.*

Docket 8998. Order, Apr. 22, 1975

Dismissal of complaint as to respondent Tommie Tubb; denial of motions of three other individual respondents for dismissal of complaint as to them; and denial of law judge's recommendation that matter be withdrawn from adjudication for consent negotiations.

ORDER DISMISSING COMPLAINT AS TO RESPONDENT TUBB AND DENYING MOTIONS TO DISMISS AS TO OTHER RESPONDENTS

On Mar. 4, 1975, the Commission *sua sponte* issued an order directing complaint counsel to show cause why this complaint should not be dismissed as to respondent Tommie Tubb. Recently, the administrative law judge certified to the Commission handwritten letters from respondents William, Helen, and Lonnie Temple, and from the corporate respondent, which he construed as motions to dismiss the complaint as to them for lack of public interest. The law judge recommended that these motions be denied, but that this matter be withdrawn from adjudication for thirty days for the purpose of pursuing settlement proposals contained in the letters.

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* For appearances, see p. 405, herein.

Complaint counsel have responded to the Show Cause order and motions to dismiss, and respondent William Temple has filed handwritten replies.

With respect to the Show Cause order, complaint counsel have offered no information tending to suggest Tubb exercised meaningful control over the acts or practices of the corporate respondent. Accordingly, the Commission now believes the public interest would not be served by litigating the charges alleged against him.

With respect to the motions to dismiss, nothing raised in regard to the remaining respondents has altered the Commission's original reason to believe a proceeding as to them would be in the public interest.

Concerning the law judge's suggestion that this matter be withdrawn from adjudication to consider the settlement proposals of certain of these respondents, two of them have asked that we appoint counsel to represent them on grounds of indigency and, until the law judge makes his recommendation on that issue, we believe such settlement negotiations would be inappropriate. Accordingly,

It is ordered, That as to respondent Tommie Tubb, the complaint in the above-captioned matter be, and it hereby is, dismissed;

It is further ordered, That the motions of respondents William F. Temple, Helen Temple, and Lonnie Temple, requesting that this complaint be dismissed as to them be, and they hereby are, denied:

It is further ordered, That the law judge's recommendation that this matter be withdrawn from adjudication for consent negotiations be, and it hereby is, denied.

Commissioners Hanford and Nye dissent from the dismissal of this complaint as to respondent Tommie Tubb for the reasons set forth in their dissenting statement of Mar. 4, 1975, [p 405 herein] to the Order to Show Cause.

IN THE MATTER OF

BUSSY ENTERPRISES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2656. Complaint, Apr. 22, 1975-Decision, Apr. 22, 1975

Consent order requiring a La Mesa, Calif., mortgage brokerage business, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *George J. Gregores.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act, and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Bussy Enterprises, Inc., a corporation doing business as Valley Mortgage Service, and Richard F. Bussy, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bussy Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 8341 Lemon Ave., La Mesa, Calif.

Respondent Richard F. Bussy is an individual and officer of the corporate respondent. In that capacity, he formulates, directs, and controls the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in arranging for the extension of credit through the operation of a mortgage brokerage business, which generally arranges, for a fee, for investors to lend money to consumers using real property as security for the performance of the obligation arising out of the transaction.

PAR. 3. In the regular course and conduct of their business as aforesaid respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in arranging for such consumer credit, respondents have failed to comply with the disclosure requirements of the Truth in Lending Act as defined and set forth in Regulation Z in that respondents have:

(a) Failed to make the required disclosures clearly, conspicuously, and in meaningful sequence, as prescribed by Section 226.6(a) of Regulation Z.

(b) Failed to retain evidence of compliance with the provisions of Regulation Z, for a two year period as prescribed by Section 226.6(i) of Regulation Z.

(c) Failed to provide the borrower with complete consumer credit cost disclosures before consummation of the transaction, as required by Section 226.8(a) of Regulation Z.

(d) Failed to set forth the finance charge expressed as an annual percentage rate, using the term "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

(e) Failed to set forth the number, amount, due dates or periods of payments scheduled to repay the indebtedness and the sum of such payments using the term, "total of payments," and to identify the amount of any "balloon payment" and state the conditions, if any, under which a "balloon payment" may be refinanced if not paid when due, as prescribed by Section 226.8(b)(3) of Regulation Z.

(f) Failed to disclose the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments, as prescribed by Section 226.8(b)(4) of Regulation Z.

(g) Failed to disclose and itemize all charges which are included in the amount of credit extended but which are not part of the finance charge using the term "amount financed," as prescribed by Section 226.8(d)(1) of Regulation Z.

(h) Failed to disclose the broker's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as prescribed by Section 226.8(d)(2) of Regulation Z.

(i) Failed to disclose and itemize the total amount of the finance charge using the term "finance charge," as prescribed by Section 226.8(d)(3) of Regulation Z.

PAR. 5. By the aforesaid failure to make disclosures and retain evidence of compliance, respondents have failed to comply with the requirements of Regulation Z, the implementing Regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failure to comply with Regulation Z constitutes violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Bussy Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 8341 Lemon Ave., La Mesa, Calif.

Proposed respondent Richard F. Bussy is an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporate respondent. His business is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Bussy Enterprises, Inc., a corporation, its successors and assigns, and its officers, and Richard F. Bussy, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any arrangement, offer to arrange, extension or advertisement of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing to make the required disclosures clearly, conspicuously, and in meaningful sequence, as prescribed by Section 226.6(a) of Regulation Z.

2. Failing to provide the borrower with complete consumer credit cost disclosures before consummation of the transaction, as required by Section 226.8(a) of Regulation Z.

3. Failing to set forth the finance charge expressed as an annual percentage rate, using the term "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

4. Failing to set forth the number, amount, due dates or periods of payments scheduled to repay the indebtedness and the sum of such payments using the term, "total of payments," and to identify the amount of any "balloon payment" and state the conditions, if any, under which a "balloon payment" may be refinanced if not paid when due, as prescribed by Section 226.8(b)(3) of Regulation Z.

5. Failing to disclose the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments, as prescribed by Section 226.8(b)(4) of Regulation Z.

6. Failing to disclose and itemize all charges which are included in the amount of credit extended but which are not part of the finance charge, using the term "amount financed," as prescribed by Section 226.8(d)(1) of Regulation Z.

7. Failing to disclose the broker's fee as a prepaid finance charge as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as prescribed by Section 226.8(d)(2) of Regulation Z.

8. Failing to disclose and itemize the total amount of the finance

charge using the term "finance charge," as prescribed by Section 226.8(d)(3) of Regulation Z.

9. Failing, in any consumer credit transaction to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9, and 226.10 of Regulation Z.

It is further ordered, That the respondent corporation shall establish and maintain a file of copies of relevant executed documents for all future and post-Jan. 1, 1974, loan transactions, for inspection and review upon request by the Federal Trade Commission for a period of three years following the date of execution of the documents. Such documents shall include copies of the Truth in Lending Disclosure Form, Promissory Notes, Notice of Right of Rescission, and Escrow Instructions.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the computation, preparation or execution of consumer credit documents or in any aspects of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each person.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

PETER SCZERBINSKI T/A BUDGET SERVICE COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2657. Complaint, Apr. 22, 1975 - Decision, Apr. 22, 1975

Consent order requiring a Cranston, R.I., moneylender in connection with the financing of insurance premiums, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commision: *James S. Parker.*

For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Peter Sczerbinski, an individual trading and doing business as Budget Service Company, hereinafter referred to as respondent, has violated the provisions of said Acts and the implementing Regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Peter Sczerbinski is an individual trading and doing business as Budget Service Company, with his office and principal place of business located at 1320 Cranston St., Cranston, R.I.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the business of lending money to the public in connection with the financing of insurance premiums.

PAR. 3. In the ordinary course and conduct of his business as aforesaid, respondent regularly extends and for some time last past has regularly extended consumer credit as "consumer credit" is defined in Regulaton Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondent in the ordinary course and conduct of his business as aforesaid, has caused and is causing to be extended consumer credit, as "consumer credit" is defined in Regulation Z, and has caused and is causing customers to execute a binding combination promissory note and disclosure statement, hereinafter referred to as the "statement." Respondent does not provide these customers with any other consumer credit cost disclosures.

By and through the use of the statement, respondent:

1. Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.
2. Failed in some instances to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price" as required by Section 226.8(c)(8)(ii) of Regulation Z.
3. Failed in some instances to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.
4. Failed in some instances to disclose the annual percentage rate accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.
5. Provided additional information which misleads or confuses the customer or obscures or detracts attention from the information required to be disclosed by Regulation Z, in violation of Section 226.6(c) of Regulation Z.
6. Failed to make the disclosures required by Section 226.8 of Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder and violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Peter Sczerbinski is an individual trading and doing business as Budget Service Company, with his office and principal place of business located at 1320 Cranston St., Providence, R.I.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Peter Sczerbinski, an individual trading and doing buiness as Budget Service Company, or under any other name or names, his successors and assigns, and respondent's agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

2. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price" as required by Section 226.8(c)(8)(ii) of Regulation Z.

3. Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

4. Failing to disclose the annual percentage rate accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Stating, utilizing or placing any additional information in conjunction with the disclosures required to be made by Regulation Z, which information misleads, confuses, contradicts, obscures or detracts attention from disclosure of information required to be disclosed by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

6. Failing, to make all disclosures required by Regulation Z clearly, conspicuously, and in meaningful sequence, as required by Section 226.6(a) of Regulation Z.

7. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4, 226.5 of Regulation Z, at the time and in the manner, form and amount required by Sections 226.6, 226.8, and 226.10 of Regulation Z.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondent promptly notify the Commission of the discontinuance of his present business or employment in those instances in which the respondent affiliates with any new business or employment which is engaged in the extension of consumer credit. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

GEORGIA AGENCY COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2658. Complaint, Apr. 22, 1975 - Decision, Apr. 22, 1975

Consent order requiring an Atlanta, Ga., seller of aerosol product distributorships and franchises, among other things to cease misrepresenting earnings and profits, nature of products, and survey results; making unsubstantiated advertising claims; and failing to disclose certain information, such as right-to-cancel provision and cooling-off period, prior to the signing of contracts.

Appearances

For the Commission: *Charles C. Murphy Jr.*
For the respondents: *John Feagin, Jr.*, Atlanta, Ga.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Georgia Agency Company, Inc., a corporation, Richard A. Bryant, Jr. and Richard R. Royal, individually and as officers of said corporation and Doyle Fleming, an individual and principal stockholder of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PAR. 1. Respondent Georgia Agency Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located in Suite 850, 8 Perimeter Pl., N.W., Atlanta, Ga.

Respondents Richard A. Bryant, Jr., Richard R. Royal, and Doyle Fleming are individuals and officers and/or stockholders of said corporation. Together they formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of aerosol health and beauty aid products, fire extinguishers, lubricants and novelty items and in the advertising, offering for sale, and sale of distributorships or franchises for said products to members of the public.

PAR. 3. In the course and conduct of their business, respondents cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Georgia and their suppliers' places of business in the State of Georgia, and other States, to purchasers thereof located in various other States of the United States. In addition, in the course and conduct of their business, respondents have disseminated and caused to be disseminated in newspapers of interstate circulation, advertisements designed to be read by persons residing outside the State of Georgia and intended to induce such persons to enter into contractual agreements with respondents to purchase distributorships or franchises and products from respondents. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in products, distributorships or franchises in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their distributorships or franchises and products, respondents have made numerous statements and representations in promotional material and in newspaper advertisements. Persons responding to said advertisements are contacted by respondents or their representatives. Said respondents or their representatives, in soliciting the sale of said products, make various oral statements and representations concerning the business opportunities and benefits to be derived by purchasing said distributorships or franchises and products.

Among and typical, but not all inclusive, of the statements and representations made in newspapers, circulars, form letters, flyers and by other printed material given to prospective purchasers are the following:

IF YOU COULD EARN: $50,000 ANNUALLY

Would you:

Work at least 3 days a week? Contact established accounts regularly? Distribute at wholesale level only, top nationally advertised products to drug, department, discount stores, etc.?

And if:

There were no selling, vending or employees? (Other than a manager, if you have other business interests)?

Could you:

Make an immediate decision? (Bring your wife, banker, lawyer or supervisor). Invest $5,000 to $10,000 (fully rebatable under contract)?

If so, call: Jan O'Connell 724-3410.

If unable to reach Jan O'Connell, call or write: The Georgia Agency Company, 8 Perimeter Place, N.W., Suite 850, Atlanta, Georgia 30339, (404) 432-0705.

WE'RE GOING TO PUT A LOCAL MAN IN BUSINESS * * * HE MUST REQUIRE $25,000 to $50,000 per year and not just a job. Very few jobs pay $50,000, but a lot of businesses do. One of them is ours * * *

* * * * * * *

We merchandise to leading drug stores, department stores, etc., the No. 2 most used personal product in America today, enhanced by the ten most coveted brand names in the industry. Only we offer this opportunity, and this you would have going for you if qualified* * *.

* * * * * * *

LOOKING FOR A $50,000 JOB?

There are not too many jobs paying $50,000, but there are lots of businesses that do. One of them is ours and we are a national company in a Billion Dollar Business.

* * * * * * *

DO NOT CALL ME UNLESS YOU QUALIFY!

We do not want a $10,000 to $20,000 per year man.
You must desire and believe that $100,000 per year and up can be made.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning not expressly set out herein, respondents have represented directly or by implication that:

A. Persons who purchase a distributorship or franchise from respondents can earn from $25,000 to $100,000 annually working part-time or full-time.

B. Said earnings projections are the earnings made by a significant number of respondents' distributors or franchisees.

C. Respondents obtain top sales producing locations such as leading department, discount, and drug stores for the placing of products purchased from them.

D. Respondents' products are nationally advertised.

E. A distributor's investment is fully refundable under the rebate provisions of respondents' contract.

F. Respondents' goods contain well-known brand name products.

G. Only respondents offer to sell distributorships to distribute the particular type of products they describe, to the exclusion of all others.

PAR. 6. In the course and conduct of their aforesaid business and for the purpose of inducing the purchase of distributorships or franchises and products, respondents, through their agents and representatives, have made and are now making, numerous oral statements and representations regarding ownership and operation of distributorships and franchises sold by respondents and the products supplied by respondents. Typical and illustrative of such statements and representations, but not all inclusive thereof, are the following:

A. A survey has been made of the market in which the prospective purchaser will operate.

B. The geographical territory granted to each distributor is exclusive.

C. The products of respondents are manufactured using an exclusive formula.

D. Respondents' products are fast moving and easy to sell.

E. A list given to a prospective distributor contains names and telephone numbers of successful distributors of respondents located in various major cities in the United States.

F. $60 of the prospective distributor's investment is used to pay for a "back up inventory."

G. Many retail accounts secured by respondents will pay cash when the respondents' products are placed in their place of business.

PAR. 7. In truth and in fact:

With respect to advertising representations:

A. Few, if any, persons who purchased a distributorship or franchise from respondents earned from $25,000 to $100,000 annually working part-time or full-time.

B. Respondents' claimed earnings projections are far in excess of the earnings of most, if not all, persons who purchased and operated respondents' distributorships or franchises.

C. Respondents do not obtain top income producing locations, but place most of the accounts in small stores which have very little consumer traffic. The locations secured by respondents are few in number and usually undesirable, unsuitable and unprofitable.

D. Respondents do not conduct any national advertising of their products and have no control over the extent to which their distributors conduct product advertising.

E. A distributor's investment is not functionally refundable under the terms of the distributor's contract with the respondents, and few, if any, distributors have received a full refund of their investment under the contractual provisions of respondents' contract.

F. Name brand products are not contained in respondents' products, but instead synthetically-prepared substances which simulate brand-name fragrances such as, but not limited to Arpege, Chanel 5, Joy, Estee Lauder, Shalimar, White Shoulders, Intimate, Jade East, English Leather, Canoe and Brut are used in the manufacture of respondents' products.

G. At least one company other than respondents offers products or distributorships to sell products the same as or similar to the products distributed by respondents.

With respect to oral representations:

A. Seldom, if ever, have respondents made a survey of the market in which the prospective purchaser intends to operate, prior to the contact by the salesman or thereafter.

B. The geographic territory granted to distributors is not exclusive, but is sometimes granted by respondents to from one to three other distributors.

C. The formula employed in the manufacture of the products sold by respondents is not exclusive to the respondents' products but is used by at least one other company in its aerosol products.

D. The aerosol products sold to distributors are not fast-moving and easy to sell, but are an off-brand and usually undesirable to consumers.

E. The list given to prospective distributors did not contain names of distributors of respondents, successful or otherwise, but were instead so-called "singers" or individuals set up by respondents to represent and hold themselves out as prosperous and successful distributors.

F. The $60 per account "back up inventory" charge is not used by respondents to purchase and warehouse products for their distributors but is merely an added cost for which distributors receive no consideration.

G. Few, if any, retail accounts secured by respondents' representatives pay cash for respondents' products, but on the contrary, most, if not all, secured accounts are specifically told that the distributor is placing the product on a "consignment only" basis.

Therefore, the statements and representations as set forth in Paragraphs Four, Five and Six hereof were, and are, false, misleading and deceptive.

PAR. 8. In addition to the foregoing statements, representations, acts and practices, respondents have engaged in the solicitation and sale of distributorships requiring a substantial outlay of money from persons with little or no previous experience in such business without affording such persons the right to cancel such contracts of sale without penalty for a period of not less than five (5) business days following the finalization of such transaction.

Therefore, the solicitation of distributorship contracts without allowing for cancellation within a reasonable time constitutes an unfair practice where such contract involves substantial monetary obligations on the part of persons with little or no experience in the type of business arrangement sold by respondents.

PAR. 9. In addition to the foregoing statements, representations, acts and practices, respondents usually and normally require payment in full of the contract price by distributors prior to fulfilling their contractual obligations including, but not limited to, establishing locations and delivering merchandise.

Therefore, the requirement that distributors pay the full contractual price prior to the performance of contractual obligations by respondents under the circumstances and conditions herein alleged constitutes an unfair practice.

PAR. 10. The use by respondents of the aforesaid unfair, false, misleading and deceptive statements, representations and practices, has had the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were true and complete, and into the purchase of respondents' distributorships or franchises and products by reason of said erroneous and mistaken belief and unfairly into the assumption of obligations and the payment of monies which they might otherwise not have incurred.

PAR. 11. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of the same or similar products.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Georgia Agency Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws

of the State of Georgia, with its office and principal place of business located at Suite 850, 8 Perimeter Pl., N.W., Atlanta, Ga.

Respondents Richard A. Bryant, Jr., Richard R. Royal and Doyle Fleming are officers and/or stockholders of said corporation. They formulate, direct and control the policies, acts and practices of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents, Georgia Agency Company, Inc., a corporation, its successors and assigns, and its officers, and Richard A. Bryant, Jr. and Richard R. Royal, individually and as officers of said corporation and Doyle Fleming, individually and as principal stockholder of said corporation, and respondents' agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of aerosol health and beauty aid products, fire extinguishers, lubricants and novelty items or any other products, services, distributorships or franchises in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that:

1. (a) Persons investing in respondents' distributorships, franchises or purchasing respondents' products will receive any stated amount of income or gross or net profits or other earnings, or misrepresenting in any manner, earnings, profits or other benefits to be derived by purchasers of respondents' distributorships, franchises or products.

(b) Any stated sums of money are past earnings of distributors or purchasers of respondents' products unless such sums are based upon the actual figures for all distributorships granted by the respondents in operation during the entire preceding twelve (12) month period, and without disclosing clearly and conspicuously immediately adjacent to any such representation that "REPRESENTATIONS ARE BASED ON THE REPRESENTATIVE NET EARNINGS OR PROFITS OF ALL INDEPENDENT DISTRIBUTORS OF THIS COMPANY IN OPERATION DURING THE PAST YEAR. THESE FIGURES SHOULD NOT BE CONSIDERED AS ACCURATE REPRESENTATIONS OF POTENTIAL EARNINGS OR PROFITS OF ANY SPECIFIC DISTRIBUTOR."

2. Respondents will obtain satisfactory or profitable locations for sale of the products purchased from them; *Provided, however*, That

nothing herein shall be construed to prohibit respondents from truthfully and nondeceptively representing that they have obtained locations or assisted in obtaining locations if respondents clearly and conspicuously disclose, in immediate conjunction therewith, the average net or gross earnings realized by all distributors from sales of its products in locations obtained by respondents or through their assistance.

3. National advertising will be conducted by or provided for by respondents.

4. The distributorship investment is fully rebatable or refundable under the contract without fully disclosing, both orally and in writing in the contract, the procedure by which such a refund may be obtained including the amount of product which must be purchased, based on the prospective distributor's investment in order to obtain full reimbursement of the investment.

5. Brand name products are used in the manufacture of respondents' products or misrepresenting in any manner the type, nature or origin of respondents' products.

6. Respondents conduct surveys or investigations to find desirable market areas for their products or suitable retail locations for the sale of their products.

7. Geographic territories granted to distributors are exclusive or that the subsequent disposition by distributors of products are geographically restricted.

8. The formula employed in the manufacture of respondents' products is exclusive.

9. The products of respondents that are sold to distributors are fast moving or easy to sell.

10. Persons named as references are distributors, successful or otherwise, unless such persons have been actual distributors as described in Section C-3 of this order.

11. There is a charge as part of the distributorship investment or otherwise for any goods or services specified in the distributorship contract or application that are not actually shipped or provided by respondents.

12. Retail accounts secured by respondents pay or will pay cash for respondents' products.

B. Making any claim in any advertising or promotional material for which the respondents do not have in their possession valid substantiating data, which data shall be made available to prospective distributors or the Commission or its staff upon demand.

C. Failing to furnish any prospective distributor with all of the following information, in writing and in a clear permanent form, at the time when contact is first established between such prospective distributor and the respondents or their representatives:

1. The official names(s) and address(es) of the corporate respondent, the parent firm or holding company of the respondent, if any; all affiliated companies that will engage in business with the distributor.

2. The business experience of the respondents, including the length of time the respondents have conducted a business of the type to be operated by the distributor, have granted distributorships for such business and have granted distributorships in other lines of business.

3. A list of the names and addresses of ten (10) persons who purchased distributorships, for products or product lines similar to, or the same as, those being offered by respondents to any prospective distributor.

4. A statement of the conditions and terms under which the respondents allow the distributor to sell, lease, assign, or otherwise transfer his distributorship, or any interest therein.

5. A statement of the number of persons who have signed distributor agreements for whom locations have not yet been agreed upon by both the respondents and the distributor.

All of the foregoing material is to be contained in a single package, is to be made available to the Commission or its staff upon demand, and is to carry a distinctive and conspicuous cover sheet with the following information (and no other) imprinted thereon in bold face type of not less than ten (10) point size:

INFORMATION FOR PROSPECTIVE DISTRIBUTORS REQUIRED BY THE FEDERAL TRADE COMMISSION

This package of information is provided for your own protection. It is in your best interest to study it carefully before making any commitment.

If you do sign a contract, you may cancel it, and obtain a full refund of any money paid, for any reason within five business days after signing. Details appear on the contract itself.

The information contained herein has not been reviewed or approved by the Federal Trade Commission, but any misrepresentation constitutes a violation of Federal law. If you feel you have been misled, you should contact the Federal Trade Commission in Washington, or the Federal Trade Commission Regional Office nearest you.

D. Failing to include immediately above and on the same page as the distributor's signature line of any contract establishing or confirming a distributorship agreement, the following statement in bold face print at least 50 percent larger than any other print in the body of such contract, or in bold face print of a contrasting color:

NOTICE: YOU ARE ENTITLED TO CERTAIN IMPORTANT INFORMATION CONCERNING THIS TRANSACTION, ENTITLED "INFORMATION FOR PROSPECTIVE DISTRIBUTORS REQUIRED BY THE FEDERAL TRADE COMMISSION." IT IS IN YOUR BEST INTEREST TO DEMAND AND STUDY SUCH

INFORMATION. *YOU MAY CANCEL THIS CONTRACT FOR ANY REASON WITHIN FIVE BUSINESS DAYS AFTER YOU SIGN IT.* If you do choose to cancel, you will be entitled to receive full refund of any money paid within five business days after Georgia Agency Company, Inc., receives notice of your cancellation. You may use any reasonable method to notify Georgia Agency Company, Inc., of your cancellation within the five business day grace period. For your own protection, you may wish to use certified mail with return receipt requested, or a telegram, either of which should be sent to the address below. [Respondents will insert here the address to which such notices should be sent.] To cancel this transaction, the notice of cancellation must be sent not later than midnight of [Respondents will insert date.]

E. Failing to cancel any contract for which a notice of cancellation was sent by any reasonable means within five (5) business days after the contract's execution, or failing to refund any money paid by distributor within five (5) business days after the date of receipt of such notice of cancellation.

As used in this order, the following definitions shall apply:

1. "Prospective distributor" means any person who approaches, or is approached by, respondents or their agents or representatives for the purpose of investigating a distributorship between such person and respondents;

2. "Time when contact is first established" means the earlier of the time when: (a) a direct personal meeting first occurs between respondents or their agents or representatives and a prospective distributor, or (b) any document or promotional literature is distributed to a prospective distributor;

3. "Business day" means any calendar day except Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, and Christmas Day.

It is further ordered, That respondents:

Inform orally all prospective customers and provide in writing in all contracts that the contract is not final and binding until respondents have completely performed their obligations thereunder by shipping all supplies and products to the customer and performing all services, and said customer has thereafter signed a statement indicating his satisfaction;

Refund immediately all monies to (1) customers who have refused to sign statements indicating satisfaction with respondents' shipments of supplies and products, and (2) customers showing that respondents' contract, solicitations or performance were attended by or involved violations of any of the provisions of this order.

It is further ordered, That respondents require that distributors pay no more than one-third of the amount of the contract price prior to the shipment of goods and the establishment of accounts to the satisfaction of the distributor.

It is further ordered, That respondents maintain files containing all inquiries or complaints from any source relating to acts or practices prohibited by this order, for a period of two (2) years after the receipt, and that such files be made available for examination by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondents' business for inspection and copying.

It is further ordered, That the corporate respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries or corporate affiliates or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future employees, agents and representatives engaged in the offering for sale or sale of respondents' distributorships or products or in any aspect of preparation, creation or placing of advertising and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the corporate respondent distribute a copy of this order to each of its operating divisions or departments.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Order, Apr. 29, 1975

Denial of respondents' petition, except Texaco, Inc., for extraordinary review of administrative law judge's order denying respondents' motion to require complaint counsel to file environmental statement.

ORDER DENYING PETITION FOR EXTRAORDINARY REVIEW

All respondents, except Texaco, Inc., have petitioned for "extraordinary review" of the administrative law judge's Feb. 5, 1975, "Order Denying Motion of Respondents to Require Complaint Counsel to File Environmental Impact Statement or, In the Alternative, For Immediate Certification to the Commission." Complaint counsel oppose this petition on the ground that such review is unauthorized by the Commission's Rules of Practice. We have considered respondents' petition and have found nothing therein which would warrant departing from the procedural requirement of Section 3.23 of the Commission's Rules of Practice or directing a certification of the matter pursuant to Section 3.22(a). Accordingly,

It is ordered, That the aforesaid petition for extraordinary review be, and it hereby is, denied.

IN THE MATTER OF

ARKON FASHIONS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2659. Complaint, Apr. 29, 1975-Decision, Apr. 29, 1975

Consent order requiring a New York City clothing importer and distributor, among other things to cease misbranding its wool products.

Apearances

For the Commission: *Jerry R. McDonald*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Arkon Fashions, Inc., a corporation, and Abraham Kunen, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Arkon Fashions, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 8 W. 33rd St., N. Y., N.Y.

Individual respondent Abraham Kunen is an officer of Arkon Fashions, Inc. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

Respondents are engaged in the importation of clothing, including but not limited to men's jackets, manufactured from wool blend fibers and the sale and distribution of such products.

PAR. 2. Respondents, now and for some time last past, have imported for introduction into commerce, introduced into commerce, transported, distributed, delivered for shipment, shipped, offered for sale, and sold in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain wool blend jackets stamped, tagged, labeled, or otherwise identified by respondents as Shell: 50 percent reprocessed wool, 23 percent linen, 27 percent acrylic-pile: 63 percent acrylic, 37 percent cotton, whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely wool blend jackets, with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. The aforesaid acts and practices of the respondents as herein alleged above, were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, all to the prejudice and injury of the public, and constituted, and now constitute, unfair and deceptive acts or practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Wool Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Arkon Fashions, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 8 W. 33rd St., N.Y., N.Y.

Respondent Abraham Kunen is an officer of said corporation. He formulates, directs and controls the acts, practices and policies of said corporation and his address is the same as that of said corporation.

Respondents are engaged in the importation and sale of wearing apparel including wool products.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Arkon Fashions, Inc., a corporation, its successors and assigns, and its officers, and Abraham Kunen, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the introduction, or importing for introduction, into commerce, or offering for sale, sale, transportation, distribution, delivery for shipment or shipment in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents notify, by delivery of a copy of this order by registered mail, each of their customers that purchased the wool products which gave rise to this complaint of the fact that such products were misbranded.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

IN THE MATTER OF

FASHION FLOORS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket 8982. Complaint, July 8, 1974–Decision, May 1, 1975

Consent order requiring a Beltsville, Md., retailer, distributor and installer of carpeting and other floor coverings, among other things to cease misrepresenting its prices; failing to maintain adequate records; misrepresenting the qualifications and abilities of its sales personnel; and misbranding or mislabeling its textile fiber products and using fiber trademarks improperly.

Appearances

For the Commission: *Everette E. Thomas, Richard F. Kelly* and *Richard C. Donohue.*

For the respondents: *Glen A. Mitchell, Stein, Mitchell & Mezines,* Wash., D. C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Fashion Floors, Inc., a corporation, and Donald F. Riesett, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the rules and regulations promulgated under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Fashion Floors, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at 10730 Baltimore Ave., Beltsville, Md.

Respondent Donald F. Riesett is an individual and is the principal officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents have caused, and now cause, the dissemination of certain advertisements concerning the aforesaid carpeting and floor coverings, by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers of interstate circulation for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of respondents' said merchandise.

In the further course and conduct of their business, as aforesaid, respondents have caused, and now cause, their said merchandise to be shipped across State lines between their various retail outlets located in the Commonwealth of Virginia and State of Maryland, for sale to purchasers thereof located in the aforesaid States. Thus, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor coverings, respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of their salesmen to prospective purchasers with respect to their products and services.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

8 hr. $50,000 CLEARANCE Savings of 20% to 50% Carpets & Rugs

* * * * * * *

Washington's Birthday Warehouse Sale 25% to 40% Savings Carpets & Rugs

* * * * * * *

Fabulous $100,000 WAREHOUSE RUG SALE

* * * * * * *

COMP. AREA VALUE	CLEARANCE SALE
$150	$29
$151	$63

* * * * * * *

YOU GET: Certified installation by carpet craftsmen who live up to their reputation - "WE CARE".

* * * * * * *

EASY CREDIT TERMS AVAILABLE

* * * * * * *

EASY CREDIT TERMS

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing, directly or by implication, that:

1. By and through the use of the word "SALE," and other words of similar import and meaning not set out specifically herein, said carpeting and floor coverings may be purchased at reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices.

2. Purchasers of respondents' carpet remnants are afforded savings of 25 to 50 percent off the prices at which such carpet remnants are usually and customarily sold at retail.

3. By and through the use of the words "Comp. Area Value" and other words of similar import and meaning not set out specifically herein, said comparative value is the price at which the same carpet remnants are being offered for sale by a substantial number of the principal outlets in respondents' trade area.

4. By and through the use of the words "Certified installation by carpet craftsmen" and other words of similar import and meaning not set out specifically herein, respondents offer to the prospective

customer the services of carpet installers who have received certification by a recognized institution or government licensing agency.

5. By and through the use of the words "Easy Credit Terms" and "Easy Credit Terms Available," purchasers of their products are granted easy credit terms, without regard to their financial status or ability to pay, by financial institutions with which the respondents deal.

PAR. 6. In truth and in fact:

1. Respondents' merchandise is not being offered for sale at reduced prices. To the contrary, in a substantial number of instances, the respondents have not established a regular selling price, and their so-called advertised "sale" price is used to mislead prospective customers into believing there is a saving from a bona fide regular selling price.

2. Purchasers of respondents' carpet remnants are not afforded savings of 25 to 50 percent off the prices at which such carpet remnants are usually and customarily sold at retail. To the contrary, the percentage price comparison is based on prices for quantities of carpeting required for wall-to-wall installation rather than the advertised carpet remnants or rugs which are usually sold for less than wall-to-wall prices.

3. The same carpet remnants are not offered for sale at the comparative price by a substantial number of the principal outlets in respondents' trade area.

4. Respondents' installers have not received certification by a recognized institution or government licensing agency.

5. Purchasers of respondents' products are not granted easy credit terms, without regard to their financial status or ability to pay, by financial institutions with which respondents deal.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof, were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting, floor coverings services of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Textile Fiber Products Identification Act and the implementing Rules and Regulations promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 10. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products including carpeting and floor covering and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 11. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and of the rules and regulations promulgated thereunder, in that they were falsely and deceptively advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were floor coverings which were falsely and deceptively advertised in *The Washington Post* and *The Evening Star*, newspapers published in the District of Columbia, and having a wide circulation in the District of Columbia and various States of the United States, in that the respondents in disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, failed to set forth such fiber content information in such a manner as to indicate that it applied only to the face, pile, or outer surface of the floor coverings and not to the exempted backings, fillings, or paddings.

PAR. 12. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder by reason of the fact that in disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding, in violation of Rule 11 of the aforesaid rules and regulations.

PAR. 13. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, and unfair methods of competition, in commerce, under the Federal Trade Commission Act.

Commissioner Thompson dissenting for the reason that no evidence of consumer injury having been shown to him, he is not persuaded that this litigation is a sound use of the taxpayer's money.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Fashion Floors, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 10730 Baltimore Ave., Beltsville, Md.

Respondent Donald F. Riesett is an officer of said corporation. He formulates, directs and controls the acts and practices of the corporate respondent, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondents Fashion Floors, Inc., a corporation, its successors and assigns, and its officers, and Donald F. Riesett, individually, and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, distribution or installation of carpeting and floor coverings, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Sale," or any other word or words of similar import or meaning not set forth specifically herein unless the price of such merchandise, being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business.

2. (a) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such merchandise or services have been sold or offered for sale in good faith at the former price by respondents for a reasonably substantial period of time in the recent, regular course of their business.

(b) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise or services in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise or services at the compared price or some higher price.

(c) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise or services, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in their trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise or services of like grade and quality.

3. Advertising or otherwise representing a compared value price for carpet remnants or rugs (a) unless the carpet remnants or rugs being advertised are of the same grade and quality as the carpets with which such advertised prices are compared; and (b) without disclosing in immediate conjunction therewith that the carpet remnants or rugs are usually sold for less than wall-to-wall prices, and that the compared value is based on the wall-to-wall price of carpeting of the same grade and quality.

4. Representing, directly or by implication, orally or in writing, that purchasers of respondents' merchandise will save any stated dollar or percentage amount without fully and conspicuously disclosing, in immediate conjunction therewith, the basis for such savings representations.

5. Failing to maintain and produce for inspection or copying for a period of three (3) years, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations as set forth in Paragraphs One, Two, and Four of this order are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

6. Representing, directly or by implication, orally or in writing, that respondents' installers have received certification by a recognized institution or government licensing agency; or misrepresenting in any manner, the training, certification, or qualifications of any of respondents' employees, agents, or representatives.

7. Representing, directly or by implication, orally or in writing, that purchasers of respondents' products are granted easy or assured credit terms by financial institutions with which respondents deal; or

misrepresenting, in any manner, the amount, type, extent or any other facet of the credit terms respondents arrange or may arrange for their purchasers.

II.

It is further ordered, That respondents Fashion Floors, Inc., a corporation, its successors and assigns, and its officers, and Donald F. Riesett, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

1. Misbranding textile fiber products by falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

2. Falsely and deceptively advertising textile fiber products by:

(a) Making any representations by disclosure or by implication, as to fiber content of any textile fiber product in any written advertisement which is used to aid, promote or assist, directly or indirectly, in the sale, or offering for sale, of such textile fiber product unless the same information required to be shown on the stamp, tag, label or other means of identification under Section 4(b)(1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

(b) Failing to set forth in advertising the fiber content of floor covering containing exempted backings, fillings or paddings, that such disclosure related only to the face, pile or outer surface of such textile fiber products and not to the exempted backings, fillings or paddings.

(c) Using a fiber trademark in advertising textile fiber products without a full disclosure of the required fiber content information in at least one instance in said advertisement.

(d) Using a fiber trademark in advertising textile fiber products containing only one fiber without such fiber trademark appearing at least once in the advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor coverings and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of carpeting or floor coverings and other merchandise, with a copy of the Commission's News Release setting forth the terms of this order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents deliver a copy of this order to all present and future personnel of respondents engaged in the sale, or the offering for sale, of any product, in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the

Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

KENNECOTT COPPER CORPORATION

Docket 8765. Order, May 5, 1975

Denial of respondent's petition to reopen the proceedings to enlarge the time for compliance.

Appearances

For the Commission: *James T. Halverson.*

For the respondent: *Arthur H. Dean, Sullivan & Cromwell,* New York City. *William Simon, Howrey, Simon, Baker & Murchison,* Wash., D.C.

ORDER DENYING PETITION TO REOPEN

On Apr. 1, 1975, respondent Kennecott Copper Corporation filed a "Petition to Reopen the Proceedings to Enlarge the Time for Compliance." By answer dated Apr. 25, 1975, Commission staff have filed a response thereto.

The Commission has determined to deny the petition to reopen. The grant of an extension of time within which to comply with a final order is a matter solely within the discretion of the Commission. The Commission believes that consideration of requests for extensions of time is best handled, like other facets of compliance proceedings, as part of the nonadjudicative work of the Commission. To reopen this proceeding in the manner requested would deprive the Commission of the informal advice of its compliance personnel in a matter that has traditionally been deemed particularly well suited to close and constant communication between the Commission and its staff. We see no need to adopt such a cumbersome and time-consuming approach here. We do not believe, in other words, that alleged difficulties in effecting prompt divestiture constitute the "changed conditions of fact or law" necessary to warrant reopening, nor do we believe that reopening to consider an enlargement of time for compliance would be in the public interest.[1] Therefore,

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[1] It should be noted that the Commission has heretofore granted two extensions of time to respondent on the basis of requests it has made, and the Commission has traditionally granted extensions of time in appropriate circumstances without reopening the affected proceedings to do so. See Section 4.3(b) of the Commission's Rules of Practice.

It is ordered, That the "Petition to Reopen the Proceeding to Enlarge the Time for Compliance" be, and it hereby is, denied.

IN THE MATTER OF

WENDELKEN-SIMMINGER AND COMPANY T/A SIMS FURNITURE CO., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2260. Complaint, May 5, 1975–Decision, May 5, 1975

Consent order requiring a Cincinnati, Ohio, seller and distributor of furniture, appliances and related products, among other things to cease misrepresenting the quantity of merchandise in stock; disparaging advertised products; failing to maintain adequate records, to disclose unit prices, and other relevant facts; using misleading sales plans. Further, respondents are required to post copies of the order in prominent locations within their store and maintain records of advertisements for a three-year period.

Appearances

For the Commission: *Allan M. Huss.*

For the respondents: *Saul M. Greenberg*, Cincinnati, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Wendelken-Simminger and Company, a corporation, trading and doing business as Sims Furniture Company, and Ralph Mazer, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Wendelken-Simminger and Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1625 Vine St., Cincinnati, Ohio. Respondent Wendelken-Simminger and Company is trading and doing business as Sims Furniture Company.

Respondent Ralph Mazer is an individual and is an officer of the corporate respondent. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the purchasing, offering for sale, sale, and distribution of furniture, appliances, and related products to the public at retail in the greater Cincinnati, Ohio, and northern Kentucky areas.

PAR. 3. In the course and conduct of their business as aforesaid, respondents regularly maintain places of business within the State of Ohio and within States other than Ohio, where they offer for sale, sell, and distribute furniture, appliances, and related products.

In the further course and conduct of their aforesaid business, respondents also disseminate, and cause to be disseminated, certain advertisements by various means in commerce including, but not limited to, advertisements disseminated by electronic broadcast media, for the purpose of inducing, and which are likely to induce, directly or indirectly, the sale of their said products in commerce.

Therefore, at all times mentioned herein, respondents have been, and now are, in competition in commerce with corporations, firms, and individuals in the sale of furniture, appliances, and related products, and maintain, and have maintained at all times mentioned herein, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business and for the purpose of inducing the sale and purchase of their merchandise, respondents have made, and are now making, numerous and various statements and representations in advertisements disseminated by electronic broadcast media. Typical and illustrative of the foregoing, but not all inclusive thereof, are the following:

> * * * Sims is now offering four rooms of furniture * * * two bedrooms, a living room and a kitchen grouping * * * a house full of furniture for just $333.
>
> * * * you can buy three rooms [of furniture] for only $288, and each room separately for just $99.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning but not specifically set out herein, respondents represent, directly or by implication, that:

1. The offers set forth in said advertisements were and are bona fide offers to sell the advertised furniture.
2. The amount of furniture offered in the groupings is adequate in and of itself to furnish an average room, without the need for additional pieces of furniture to be purchased.

PAR. 6. In truth and in fact:

1. The offers set forth in said advertisements, and other offers not

set forth in detail herein, were not, and are not, bona fide offers to sell groupings of furniture at the advertised price but, to the contrary, were and are made to induce prospective purchasers to visit respondents' place of business. When prospective purchasers, in response to said advertisements, attempt to purchase furniture at the advertised price, salesmen represent, either directly or by implication, that the advertised furniture is of poor quality and inferior in appearance and durability; and such salesmen make no effort to sell the furniture at the prices advertised. Rather, said salesmen, either directly or by implication, attempt to discourage the purchase of said advertised furniture and attempt to, and often do, sell other furniture at considerably higher prices.

2. The amount of furniture offered for sale in the advertisement is not adequate in and of itself to furnish an average room, without the need for additional pieces of furniture to be purchased.

Therefore, the representations, acts, and practices as set forth in Paragraphs Four and Five hereof were and are unfair, misleading, and deceptive.

PAR. 7. The use by respondents of the aforesaid false, misleading, and deceptive statements and representations, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of furniture from respondents' place of business by reason of said erroneous and mistaken belief.

PAR. 8. In the course and conduct of their aforesaid business, respondents fail to display the retail selling price of each item advertised or offered for sale in their place of business, or to otherwise enable the customer to ascertain the retail selling price of each item prior to its purchase. Thus, respondents have failed to disclose a material fact, which, if known to certain customers, would be likely to affect their consideration of whether or not to purchase the items offered for sale.

PAR. 9. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Wendelken-Simminger and Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1625 Vine St., in the city of Cincinnati, State of Ohio. Respondent Wendelken-Simminger and Company trades and does business as Sims Furniture Company.

Respondent Ralph Mazer is an officer of said corporation. He formulates, directs, and controls the policies, acts, and practices of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Wendelken-Simminger and Company, a corporation, trading and doing business as Sims Furniture Company, its successors and assigns, and its officers, and Ralph Mazer, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or any other device in connection with the purchasing, advertising, offering for sale, sale, and distribution of furniture and appliances, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising or offering any products for sale for the purpose of obtaining leads or prospects for the sale of different products unless the advertised products are capable of adequately performing the function for which they are offered, and respondents maintain an adequate and readily available stock of said products.

2. Disparaging in any manner, or refusing to sell, any product advertised.

3. Using any advertising, sales plan or procedure involving the use of false, deceptive or misleading statements or representations designed to obtain leads or prospects for the sale of other merchandise.

4. Representing directly or indirectly that any products or services are offered for sale when such is not a bona fide offer to sell said products or services.

5. Failing to disclose the number and type of the pieces included in a room grouping, in any advertisement which refers to room groupings.

6. Failing to post, clearly and conspicuously, upon each item to be sold, the retail selling price of each item.

7. Failing to disclose to the consumer, in writing on the sales invoice or sales contract, or any other written evidence of sale, the manufacturer, model number, description, and retail selling price of each item at the time each item is purchased.

8. Failing to maintain adequate records as will show:

(a) Each advertised item identified by model number, manufacturer, description, and date(s) advertised; and

(b) The number of sales made of each advertised product or service at the advertised price for each advertisement published or otherwise disseminated during the period of its publication or other dissemination, and for the six weeks immediately thereafter.

Said records shall be retained for three years from the date of the advertisement, and shall be made available to personnel of the Federal Trade Commission upon request.

It is further ordered, That respondents shall maintain, for a three (3) year period from the date of each advertisement, copies of all advertisements, including newspaper, radio, and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized in the advertising, promotion, or sale of merchandise.

It is further ordered, That for a period of one (1) year, respondents post in a prominent place in each salesroom or other area wherein respondents sell furniture or other products and services, a copy of this cease and desist order, with a notice that any customer or prospective customer may receive a copy on demand.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in any aspect of preparation, creation, or placing of advertising, and to all personnel of respondents responsible for the sale or offering for sale of all products covered by this order, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

JONEL PAY PLAN, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2661. Complaint, May 5, 1975 - Decision, May 5, 1975

Consent order requiring a Warwick, R.I., moneylender in connection with financing insurance premiums, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *James S. Parker.*

For the respondents: *Bernard C. Gladstone, Gladstone & Zarlenga*, Providence, R.I.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Jonel Pay Plan, Inc., a corporation, and John R. Young, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Jonel Pay Plan, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 3308 Post Rd., Warwick, R.I.

Respondent John R. Young is an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporation, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the business of lending money to the public in connection with the financing of insurance premiums.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend and for some time last past have regularly extended consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of their business as aforesaid, have caused and are causing to be extended consumer credit as "consumer credit" is defined in Regulation Z, and have caused and are causing customers to execute a binding premium finance agreement, hereinafter referred to as the "agreement." Respondents do not provide these customers with any other consumer credit cost disclosures.

By and through the use of the agreement, respondents:

1. Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment as required by Section 226.8(c)(3) of Regulation Z.

2. Failed in some instances to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

3. Provide additional information which misleads or confuses the customer or observer or detracts attention from the information required to be disclosed by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

4. Failed to make the disclosures required by Section 226.8 of Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder and violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of the rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Jonel Pay Plan, Inc. is a corporation organized,

existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 3308 Post Rd., Warwick, R.I.

Respondent John R. Young is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Jonel Pay Plan, Inc., a corporation, its successors and assigns, and its officers, and John R. Young, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

2. Failing to disclose the annual percentage rate accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

3. Stating, utilizing or placing any additional information in conjunction with the disclosures required to be made by Regulation Z, which information misleads, confuses, contradicts, obscures or detracts attention from disclosure of information required to be disclosed by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

4. Failing to make all disclosures required by Regulation Z, clearly, conspicuously and in meaningful sequence, as required by Section 226.6(a) of Regulation Z.

5. Failing, in any consumer credit transaction or advertisement, to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z, at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

KUSTOM ENTERPRISES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2662. Complaint, May 7, 1975-Decision, May 7, 1975

Consent order requiring an Atlanta, Ga., seller and distributor of equipment and supplies used in the assembly of stereo tapes, among other things to cease misrepresenting earnings and profits, guarantees; and opportunities; failing to deliver goods; failing to disclose contract cancellation rights, to make refunds, and to maintain records.

Appearances

For the Commission: *David E. Krischer.*

For the respondents: *Morton P. Levine, Levine, D'Alessio & Cohn,* Atlanta, Ga.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Kustom Enterprises, Inc., a corporation, and Stephen R. Cohen, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Kustom Enterprises, Inc., (hereinafter referred to as Kustom), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and principal place of business located at 200 Wendell Ct., Suite 230, Atlanta, Ga.

Respondent Stephen R. Cohen is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of equipment and supplies used in the assembly of stereo tapes to distributors and potential distributors. Said distributors purchase respondents' equipment and supplies under a distribution agreement, whereby respondents agree to purchase each week from distributors, a specified amount of assembled stereo tapes at a specified price.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents have caused equipment and supplies used in the assembly of stereo tapes, when sold, to be shipped or delivered from their place of business in the State of Georgia to purchasers thereof located in other States of the United States, and disseminated in newspapers of interstate circulation, advertisements designed and intended to induce sales of such equipment and supplies, and thereby maintain, and at all times mentioned herein have maintained, a substantial course of trade in said equipment and supplies in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business and for the purpose of inducing the purchase of equipment and supplies used in the assembly of stereo tapes, respondents have made numerous statements and representations in newspapers and promotional material. Typical and illustrative of such statements and representations, but not all inclusive thereof, are the following:

* * * * * * *

GUARANTEED INCOME

* * * * * * *

Make $300 a week part time; unlimited income full time.

* * * * * * *

EXCEPTIONALLY HIGH INCOME

* * * * * * *

Contract for 1,500 pieces per week at $300
net weekly profit. Expansion possible.

* * * * * * *

PAR. 5. In the course and conduct of their aforesaid business and for the purpose of inducing the purchase of equipment and supplies used in the assembly of stereo tapes, respondents through their agents and representatives, have made and are now making, numerous oral statements and representations regarding ownership and operation of stereo tape distributorships sold by respondents. Typical and illustrative of such statements and representations, but not all inclusive thereof, are the following:

Kustom guarantees that distributors will earn at least $300 per week.

Each week, Kustom will supply its distributors with the amount of equipment and supplies necessary for the assembly of the stereo tapes which Kustom has contracted to buy weekly from the distributors.

Each week, Kustom will purchase from its distributors the contractually specified amount of assembled stereo tapes.

Each week, Kustom will pay its distributors for the stereo tapes it has purchased from them.

Kustom distributors earn an amount equivalent to their initial investments, within twenty-six weeks of operation.

PAR. 6. By and through the use of the statements and representations set forth in Paragraph Four, and others of similar import but not specifically set forth therein, and through said oral statements set forth in Paragraph Five, and others of similar import but not specifically set forth therein, made by respondents, their employees, agents and representatives, respondents have represented, and do now represent, directly or by implication to the purchasing public, that:

1. Distributors are guaranteed to earn $300 per week part-time or an unlimited amount per week full-time.
2. Each week, distributors will receive the amount of equipment and supplies necessary for the assembly of the stereo tapes which respondents have contracted to buy weekly from the distributors.

3. Each week, respondents will purchase from distributors the contractually specified amount of assembled stereo tapes.

4. Each week, respondents will pay distributors for the assembled stereo tapes the respondents have purchased from them.

5. Distributors will earn an amount equivalent to their initial investments within twenty-six weeks of operation.

PAR. 7. In truth and in fact:

1. The representations of guaranteed part-time or full-time weekly earnings cannot be substantiated; relatively few, if any, distributors earn $300 per week part time or an unlimited amount per week full time.

2. Relatively few, if any, distributors receive the equipment and supplies necessary for the assembly of stereo tapes each week. In many instances distributors have had to wait up to eight weeks for their deliveries.

3. Because of the nondelivery of equipment and supplies, relatively few, if any, distributors have been able to sell to respondents each week the contractually specified amount of assembled stereo tapes.

4. Because of the nondelivery of equipment and supplies, relatively few, if any, distributors receive weekly payments from respondents.

5. Relatively few, if any, distributors earn an amount equivalent to their initial investments within twenty-six weeks of operation.

Therefore, the statements and representations, as set forth in Paragraphs Four and Five hereof, were and are, false, misleading and deceptive.

PAR. 8. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents have been in substantial competition in commerce, as "commerce" is defined in the Federal Trade Commission Act, with corporations, firms and individuals in the sale of equipment and supplies used in the assembly of stereo tapes of the same kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its rules, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint making the following jurisdictional findings, and enters the following order:

1. Respondent Kustom Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at 200 Wendell Ct., Suite 230, Atlanta, Ga.

Respondent Stephen R. Cohen is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation. His address is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Kustom Enterprises, Inc., a corporation, its successors and assigns, and its officers, and Stephen R. Cohen, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of equipment and supplies used in the assembly of stereo tapes, and any other products or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. Distributors will earn or can reasonably expect to earn or receive any stated or gross or net amount of earnings or profits; or representing, in any manner, the past earnings of distributors unless in fact the past earnings represented are those of a substantial number of distributors and accurately reflect the average earnings of said distributors under circumstances similar to those of the person to whom the representation is made.

2. Earnings of distributors are guaranteed unless the nature, extent and duration of the guarantee, the manner in which the guarantor will perform thereunder and the name and address of the guarantor are clearly and conspicuously disclosed and respondents do in fact fulfill all of their requirements under the terms of said guarantee.

3. Respondents will deliver the equipment and supplies used in the assembly of stereo tapes on a weekly or other periodic basis, unless in each instance such delivery is made as represented by respondents, subject to any possibilities of delay which will be disclosed in writing at the point of sale; or misrepresenting in any manner the time within which respondents' equipment and supplies will be delivered.

4. Respondents will purchase assembled stereo tapes from distributors on a weekly or other periodic basis unless in each instance distributors will have delivered to them the equipment and supplies necessary for the assembly of such tapes.

5. Respondents will make weekly or other periodic payments to distributors in payment for the assembled stereo tapes it has purchased from them unless in each instance distributors will have delivered to them the equipment and supplies necessary for the assembly of such tapes and in each instance such payments are made as represented by respondents.

6. Distributors will earn or can reasonably expect to earn an amount equivalent to their initial investment within twenty-six weeks

of operation; or representing, in any manner, the time within which a distributor can earn back his investment.

It is further ordered, That respondents:

(a) Orally inform all prospective distributors and provide in writing in all contracts entered into after the effective date of this order, that the contract may be canceled for any reason by notification to respondents in writing within three business days from the date of execution of the contract.

(b) Provide a separate and clearly understandable form to all prospective distributors at the time of execution of the contract, which said distributors may use as a notice of cancellation.

(c) Refund immediately all monies received on contracts entered into after the effective date of this order to (1) prospective distributors who have requested contract cancellation in writing within three business days from the execution thereof and to (2) prospective distributors showing that respondents' contract, solicitations or performance were attended by or involved violations of any of the provisions of this order.

It is further ordered, That respondents:

(a) Refund immediately, pursuant to the terms described in part (c) below, all monies received on contracts entered into before the effective date of this order to distributors who, as of the effective date of this order, have not been brought within two weeks of being up to date on the receipt of their contractually specified weekly shipments of the equipment and supplies used in the assembly of stereo tapes unless;

(1) respondents obtain a signed statement from a distributor stating his desire to reduce his weekly output and respondents have brought him within two weeks of being up to date on his revised output, or

(2) respondents show that a distributor has in his possession two weekly shipments of equipment and supplies used in the assembly of stereo tapes which the distributor has not assembled and shipped to respondents for purchase by respondents, or

(3) respondents obtain a signed statement from a distributor stating that he does not wish a refund pursuant to this provision.

(b) Provide an immediate refund, pursuant to the terms described in part (c) below, to any distributor to whom deliveries of equipment and supplies used in the assembly of stereo tapes fall more than two weeks behind the distributor's contractually specified periodic quota, if at any time during such period said distributor requests such a refund in writing unless;

(1) respondents obtain a signed statement from a distributor stating his desire to reduce his weekly output and respondents have brought him within two weeks of being up to date on his revised output, or

(2) respondents show that a distributor has in his possession two

weekly shipments of equipment and supplies used in the assembly of stereo tapes which the distributor has not assembled and shipped to respondents for purchase by respondents, or

(3) respondents obtain a signed statement from a distributor stating that he does not wish a refund pursuant to this provision.

(c) For the purposes of parts (a) and (b) above, the term "refund" shall mean all sums of money paid by a distributor to respondents less (1) any amount paid by respondents to distributors, and (2) the price paid for any equipment or supplies purchased by the distributor that the distributor does not return (a distributor requesting a refund pursuant to this provision who has equipment or supplies either credited to him in an account, or in his actual possession, shall be entitled to a refund for such merchandise or equipment on the basis of the price paid by the distributor for the equipment or supplies; *Provided, however,* That any of said equipment or supplies in the distributor's actual possession for which he requests a refund under this provision must be delivered to respondents before the refund is payable to the distributor).

It is further ordered, That respondents maintain files containing all inquiries or complaints on contracts entered into after the effective date of this order from any source relating to acts or practices prohibited by this order, for a period of two (2) years after their receipt, and that such files be made available for examination by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondents' business for inspection and copying.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future employees, agents and representatives engaged in the offering for sale or sale of respondents' distributorships or products or in any aspect of preparation, creation or placing of advertising and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future distributors and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

THE ROUSE COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2663. Complaint, May 7, 1975–Decision, May 7, 1975

Consent order requiring a Columbia, Md., based regional shopping center developer, among other things to cease controlling the pricing and advertising practices of its tenants.

Appearances

For the Commission: *James D. Tangires* and *Gary M. Laden*.

For the respondent: *Lewis A. Noonberg, Piper & Marbury*, Baltimore, Md.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. §41, *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporation named as respondent in the caption hereof, and more particularly designated and described hereinafter, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act as amended, and it appearing to the Commission that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint, stating the following:

PARAGRAPH 1. For the purpose of this complaint the following definitions shall apply:

(a) The term "respondent" refers to The Rouse Company, a corporation, its successors and assigns, any corporation, subsidiary, division or other device, their officers, agents, representatives and employees.

(b) The term "shopping center" refers to a group of retail outlets in the United States of America, planned, developed and managed as a unit in relation to a trade area which the development is intended to serve and providing on-site parking in some definite relationship to the types and sizes of stores in the development.

(c) The term "tenant" refers to any occupant or potential occupant of retail space in a shopping center, whether as lessee or owner of such space.

(d) The term "retailer" refers to a tenant which sells merchandise or services to the public.

(e) The terms "price or prices," "range of prices" and "price range" refer to such descriptive words as "popular priced," "medium priced," "high priced," "better priced," "the sale of merchandise not to exceed $10," and "the sale of merchandise not less than 99 cents."

PAR. 2. Respondent, The Rouse Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business located at The Rouse Company Headquarters Bldg. in Columbia, Md. The Rouse Company's subsidiaries are engaged in the acquisition, development and ownership of income producing real estate in the United States and Canada. The term "Rouse" used hereinafter includes The Rouse Company and its subsidiaries.

The following Rouse subsidiaries have developed regional shopping centers in the United States:

(a) Almeda Mall, Inc. - Almeda Mall Houston, Tex.
(b) Charlottetown, Inc. - Charlottetown Mall Charlotte, N. C.
(c) Cherry Hill Center, Inc. - Cherry Hill Mall Cherry Hill, N. J.
(d) Columbia Mall, Inc. - Columbia Mall Columbia, Md.
(e) Eastfield Mall, Incorporated - Eastfield Mall Springfield, Mass.
(f) Echelon Mall, Inc. - Echelon Mall Echelon, N. J.
(g) Exton Square, Inc. - Exton Mall Exton, Pa.
(h) Franklin Park Mall, Inc. - Franklin Park Mall Toledo, Ohio
(i) Greengate Mall, Inc. - Greengate Mall Greensburg, Pa.
(j) Harundale Mall, Inc. - Harundale Mall Glen Burnie, Md.
(k) Austin Mall, Inc. - Highland Mall Austin, Tex.
(l) Louisville Shopping Center, Inc. - Louisville Mall Louisville, Ky.
(m) North Star Mall, Inc. - North Star Mall San Antonio, Tex.
(n) Northway Mall, Inc. - Northway Mall Pittsburgh, Pa.
(o) Northwest Mall, Inc. - Northwest Mall Houston, Tex.
(p) Paramus Park, Inc. - Paramus Park Mall Paramus, N. J.
(q) Perimeter Mall, Inc. - Perimeter Mall Atlanta, Ga.

(r) Plymouth Meeting Mall, Inc. - Plymouth Meeting Mall Montgomery County, Pa.

(s) Salem Mall, Incorporated - Salem Mall Dayton, Ohio

(t) The Willowbrook Corporation - Willowbrook Mall Wayne, N. J.

(u) Woodbridge Center, Inc. - Woodbridge Mall Woodbridge, N. J.

The property on which the aforesaid regional shopping centers were developed by Rouse is held in fee, leasehold, in fee and leasehold, and in fee by joint venture. For the fiscal year ending May 31, 1973, Rouse had total revenues which exceeded $57,000,000, of which approximately $35,000,000 was earned or received from its regional shopping center operations.

Rouse is one of the nation's largest shopping center developers, having built regional shopping centers in at least 12 States. The regional shopping centers developed by Rouse have approximately 15,664,130 square feet of leasable area. Rouse owns approximately 8,260,130 square feet of this leasable area, with the balance of leasable area owned or operated by major tenants in the regional shopping centers. The stores or businesses which lease or occupy space in Rouse's shopping centers offer to sell a variety of consumer goods and services. The annual retail sales to consumers of these various goods and services in Rouse's shopping centers exceeds $1,000,000,000.

PAR. 3. In the course and conduct of its business, Rouse has, and is now engaged in negotiating and executing agreements, leases, and building agreements with persons located in various States throughout the country with respect to constructing, leasing, and operating retail stores in Rouse shopping centers. In the course and conduct of the negotiation and execution of these agreements, leases, and building agreements, exchanges of information and communications have taken place between Rouse headquarters in Maryland and persons referred to above in various other States. Rouse has disseminated, and caused to be disseminated, certain advertisements and promotional materials concerning occupancy in its shopping centers through the use of various news media in commerce. Correspondence with respect to the approval of tenants for inclusion in Rouse shopping centers passes between various States by use of the United States mail. Tenants in Rouse shopping centers purchase consumer products from suppliers located throughout the United States, advertise these products in newspapers circulated in various States, and resell these products in substantial quantities to consumers, including some who cross State lines to transact business in Rouse shopping centers. By and through the aforesaid course and conduct of its business, Rouse has engaged and is now engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. The movement of population from the central city to the suburbs has precipitated the growth of shopping centers in suburban areas. In 1972, retail sales in shopping centers in the United States were approximately $123.5 billion and accounted for approximately 44 percent of the total retail sales in the United States. Retail sales for regional shopping centers accounted for 45 percent of the total retail sales in shopping centers. In 1972, over 20 percent of the total retail sales, amounting to approximately $56 billion, were made in regional shopping centers.

Regional shopping centers are the most economically significant type of shopping center. They reproduce to a substantial extent the retail facilities once available only in downtown business districts, and are displacing and replacing the central, downtown business districts as primary outlets for retail distribution of goods and services.

PAR. 5. Except to the extent that competition has been hindered, lessened and eliminated as set forth in this complaint, retailers selling goods and services in the respondent's shopping centers are in competition with each other and with other retailers; and Rouse is in substantial competition in commerce with others engaged in the development of shopping centers.

PAR. 6. In the course and conduct of its business, respondent is and has been engaged in unfair methods of competition and unfair acts and practices in commerce in that it has unfairly and unlawfully inserted restrictive provisions in its leasing arrangements, operating agreements, contracts, or understandings entered into with tenants in shopping centers which tend to maintain, control, fix and establish the retail selling prices of goods and services by these tenants. Typical and illustrative of said restrictive provisions, but not all inclusive thereof, are the following:

> Tenant will not operate or cause to be operated a discount house or discount business on the leased premises. "Discount house" or "discount business," for the purposes of this lease, shall mean a retail establishment which regularly sells the major portion of its merchandise off-price or at prices below normal usual retail prices, or advertises or holds itself out to the public as a discount house or as one regularly selling off-price.
>
> The leased premises shall be used by Tenant solely for the purpose of costume jewelry and watches not to exceed $10 in price.
>
> The leased premises shall be used by Tenant solely for the purpose of conducting therein the business of sale, at retail, of medium to better priced costume jewelry (not less than 99 cents for any one item), women's handbags and light accessories.

PAR. 7. The aforesaid lease provisions, operating agreements, contracts, or understandings between the respondent and its tenants set forth in Paragraph Six have had and continue to have the tendency to restrain trade and commerce. Included among the effects of such restraints are the following:

(a) fixing, controlling and maintaining retail prices;

(b) eliminating, hindering, and discouraging discount advertising, discount pricing, and discount selling;

(c) denying the right to determine the prices or range of prices at which tenants may sell their goods and services in shopping centers;

(d) denying the public the benefit of price competition.

The aforesaid lease provisions, operating agreements, contracts, or understandings, respondent's acts, practices and method of competition in connection therewith, and the adverse competitive effects resulting therefrom constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of complaint which the Washington, D.C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of it rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Rouse Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at The Rouse Company Headquarters Bldg. in Columbia, Md.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

A. *It is ordered*, That respondent The Rouse Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, joint venture or other device, do forthwith cease and desist from making, carrying out, or enforcing, directly or indirectly, an agreement or provision of an agreement which:

1. specifies that any retailer in any of respondent's shopping centers shall or shall not sell merchandise or services at any particular price or within any range of prices;

2. specifies that any retailer in any of respondent's shopping centers shall not be a discounter or sell merchandise or services at discount prices;

3. specifies the content of or prohibits any type of advertising by a retailer, other than advertising within any of respondent's shopping centers, except that respondent may require a tenant to include the name, insignia, or other identifying mark of any of respondent's shopping centers in advertising pertaining to the tenant's store in any of respondent's shopping centers; or

4. prohibits price advertising within any of respondent's shopping centers or controls advertising within any of respondent's shopping centers in such a way as to make it difficult for consumers to discern advertised prices from the common area of such shopping centers, provided that in all other respects, respondent may make, carry out and enforce reasonable standards for advertising within any of respondent's shopping centers.

B. *It is further ordered*, That respondent will within sixty (60) days after service of this order mail a copy of Letter "A," attached hereto, to all tenants in respondent's shopping centers whose leases make reference in the use clauses to the price or quality of the merchandise or services to be sold.

C. *It is further ordered*, That respondent cease and desist from entering into any agreement with any tenant that said tenant may:

1. specify or control or may require respondent to specify or control prices or price ranges of merchandise or services sold by any other retailer;

2. control or may require respondent to control discounting by any other retailer; or

3. exclude any retailer from any of respondent's shopping centers by reason of such retailer's discount selling or discount advertising.

D. *It is further ordered*, That respondent advise the Commission in writing within sixty (60) days after respondent has knowledge of any occasion that:

1. a tenant disapproves the admission into any of respondent's shopping centers of any other retailer;

2. a tenant refuses to approve the renewal of another retailer's lease in any of respondent's shopping centers;

3. a tenant approves the admission of another retailer into any of respondent's shopping centers subject to conditions imposed by the tenant relating to the pricing, price ranges, trade names, store names, trade marks, brands or lines of merchandise, or the discounting practices or methods of such other retailer; or

4. a tenant enters into an agreement with respondent to become a tenant in any of respondent's shopping centers on condition that respondent refuse to renew the lease of another retailer.

E. *It is further ordered*, That respondent will not base its decision to grant, renew or extend the lease of a tenant in any of respondent's shopping centers upon the pricing practices of such tenant.

II

It is further ordered, That respondent shall:

A. distribute a copy of this order to each of its operating divisions within thirty (30) days after service of this order;

B. within thirty (30) days after service of this order upon respondent, notify each tenant in any of respondent's shopping centers of this order by providing each tenant with a copy of this order by registered or certified mail;

C. within sixty (60) days after service of this order upon respondent, file with the Commission a report showing the manner and form in which it has complied and is complying with each and every specific provision of this order; and

D. notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

LETTER "A"

[On Official Stationery of The Rouse Company subsidiary or affiliate operating the particular shopping centers affected by this order]

Gentlemen:

We have consented to the issuance by the Federal Trade Commission of an order which, among other things, prohibits us from specifying that our tenents shall or shall not sell merchandise or services at any particular price or within any range of prices. A copy of the order is enclosed.

Your lease may describe the merchandise or services you are to sell in terms such as "popular priced," "medium priced," "high priced," "medium to better quality," or the like. Please be advised that such language is intended only as a description of the general quality of the merchandise or services you sell. It is not intended and will not be enforced to affect the retail selling price of your merchandise or services. Pursuant to the terms of the order you are free to set the prices for your merchandise and services and are not required to adhere to any particular price or within any range of prices, expressed or implied, in your lease or in any other agreements with the shopping center.

Neither this letter nor the attached order shall operate as a waiver of any rights which we may now have to require you to sell certain merchandise or services at a general quality level or levels.

Sincerely,

Vice President
Rouse Subsidiary or Affiliate

IN THE MATTER OF

JULIAN L. LEVINSON T/A ASSOCIATES MORTGAGE COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2667. Complaint, May 12, 1975-Decision, May 12, 1975

Consent order requiring a Hampton, Va., loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Bernard Rowitz, Alice C. Kelleher* and *Thomas J. Keary.*

For the respondent: *Robert Beale,* Newport News, Va.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Julian L. Levinson, an individual, trading and doing business as Associates Mortgage Company, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Julian L. Levinson is an individual, trading and doing business as Associates Mortgage Company, with his principal office and place of business located at 1517 Aberdeen Rd. and Mercury Blvd., Hampton, Va.

PAR. 2. Respondent is now, and for some time last past has been, engaged as a broker in the arranging and securing of loans for the general public.

PAR. 3. In the ordinary course and conduct of his business as aforesaid, respondent regularly arranges for the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of business as aforesaid, respondent's customers are provided with consumer credit cost disclosure statements.

By and through the use of the aforesaid consumer credit cost disclosures respondent:

1. Fails to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.

2. Fails to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Fails to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Fails to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Fails to print the terms "finance charge" and "annual percentage

rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Fails to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Fails to identify the broker as a creditor, as "creditor" is defined by Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Fails to make full consumer credit cost disclosures before the transaction is consummated, as required by Section 226.8(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of the Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Julian L. Levinson is an individual, trading and doing business as Associates Mortgage Company, with his office and principal place of business located at 1517 Aberdeen Rd. and Mercury Blvd., Hampton, Va.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Julian L. Levinson, an individual, trading and doing business as Associates Mortgage Company, or under any other name or names, his successors and assigns, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement for the extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension or arrangement for the extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.

2. Failing to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Failing to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Failing to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Failing to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Failing to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Failing to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Failing to provide the borrower complete consumer credit cost disclosures before consummation of the transaction, as required by Section 226.8(a) of Regulation Z.

9. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and

226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondent prominently display no less than two signs on the premises which will clearly and conspicuously state that a customer must receive a complete copy of the consumer credit cost disclosures, as required by the Truth in Lending Act, in any transaction which is financed, before the transaction is consummated.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the arranging for the extension of consumer credit, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliations with a new business or employment. Such notice shall include respondent's current business addresses and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

COMMERCIAL INVESTORS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2668. Complaint, May 12, 1975-Decision, May 12, 1975

Consent order requring a Hampton, Va., loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Bernard Rowitz, Alice C. Kelleher* and *Thomas J. Keary.*

For the respondents: *Philip L. Avis*, Newport News, Va.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Commercial Investors, Inc., a corporation, Virginia Mortgage and Loan Association, Inc., a corporation, and John L. Lane, Jr., individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Commercial Investors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its principal office and place of business located at 2000 Kecoughtan Rd., Hampton, Va.

Said respondent controls and dominates the acts and practices of respondent Virginia Mortgage and Loan Association, Inc., a wholly-owned subsidiary which is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its principal office and place of business located at 2000 Kecoughtan Rd., Hampton, Va.

Respondent John L. Lane, Jr. is an officer of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondents.

All of the aforementioned respondents cooperate and act together in the carrying out of the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged as brokers in the arranging and securing of loans for the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of business as aforesaid, respondents' customers are provided with consumer credit cost disclosure statements.

By and through the use of the aforesaid consumer credit cost disclosures respondents:

1. Fail to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.

2. Fail to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Fail to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Fail to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Fail to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Fail to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Fail to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Fail to make full consumer credit cost disclosures before the transaction is consummated, as required by Section 226.8(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of the Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Commercial Investors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 2000 Kecoughton Rd., Hampton, Va.

Said respondent controls and dominates the acts and practices of respondent Virginia Mortgage and Loan Association, Inc., a wholly-owned subsidiary which is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its office and principal place of business located at 2000 Kecoughtan Rd., Hampton, Va.

Respondent John L. Lane, Jr. is an officer of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondents.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Commercial Investors, Inc., a corporation, its successors and assigns, and its officers, and Virginia Mortgage and Loan Association, Inc., a corporation, its successors and assigns, and its officers, and John L. Lane, Jr., individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement for the extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension or arrangement for the extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the

Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.

2. Failing to disclose the broker's fee or finder's fee as prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Failing to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Failing to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Failing to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Failing to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Failing to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Failing to provide the borrower complete consumer credit cost disclosures before consummation of the transaction, as required by Section 226.8(a) of Regulation Z.

9. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

It is furthered ordered, That respondents prominently display no less than two signs on the premises which will clearly and conspicuously state that a customer must receive a complete copy of the consumer credit cost disclosures, as required by the Truth in Lending Act, in any transaction which is financed, before the transaction is consummated.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of any successor corporations, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the arranging for the extension of consumer credit and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliations with a new business or employment. Such notice shall include respondent's current business addresses and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

EXXON CORPORATION, ET AL.*

Docket 8934. Order, May 13, 1975

Denial of motion by Texaco, Inc., to disqualify the administrative law judge in this proceedings.

ORDER DENYING MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGE

Upon his appointment as administrative law judge in this matter, Alvin L. Berman informed the parties that, as a former member of the litigation staff of the Commission's Office of General Counsel, he had represented the Commission on appeal in seven cases involving one or more of the respondents herein. Arguing that, in at least three of these matters, Judge Berman had taken positions on issues which have arisen in this proceeding, respondent Texaco moved that he disqualify himself. The judge declined to do so, on the ground his role in the previous cases had been limited to that of an advocate and his statements made in performing that function were not necessarily indicative of his own views. By order of Mar. 10, 1975, he certified this question to the

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* For appearances, see, p. 91, herein.

Commission and on Mar. 20, 1975, Texaco moved, pursuant to Section 3.42(g)(2) of the Commission's Rules of Practice, that he be disqualified.

An administrative official may be subject to disqualification under either of two sections of the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* First, Section 554(d) provides in relevant part:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision * * *.

Respondent does not argue that Judge Berman should be disqualified under this standard and our review of this matter has convinced us that such an argument would have to be rejected because his role as appellate advocate was neither investigative nor prosecutorial in nature within the meaning of Section 554.

The Administrative Procedure Act also provides for disqualification of a presiding or participating employee "[o]n the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification * * *." 5 U.S.C. §556(b). Respondent does not argue that Judge Berman is personally biased against it, but, rather, bases its motion on a line of cases holding that an administrative official should be disqualified where he has prejudged a factual issue likely to arise in a matter. The principal case in this area is *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757 (6th Cir. 1966), wherein then Chairman Dixon was found ineligible to participate in the decision due to his prior supervision of a congressional investigation involving many of the facts which were at issue in the Commission proceeding.

However, *American Cyanamid* is distinguishable from the case at hand because here Judge Berman did not participate in the development of the evidentiary facts in the previous case. Further, the ultimate facts in *Cyanamid* were nearly identical to those which were the focus of the congressional investigation, whereas here it is likely that whatever relationship exists between this matter and the *Texaco-Goodrich* case is attenuated at best. Finally, it should be pointed out that the court in *Cyanamid* specifically based its decision not on the mere participation by then Chairman Dixon in the legislative and administrative matters, but on "* * * the depth of the (legislative) investigation and the questions and comments by Mr. Dixon as counsel," which led the court to conclude that Mr. Dixon had formed opinions as to the ultimate facts. The same can hardly be true of Judge Berman since his participation in the previous cases was limited to the role of an advocate in the appellate court, defending findings already adjudicated by the Commission.

Respondent argues vigorously that general standards for judicial officers have been strengthened recently and that Judge Berman's continued participation in this matter would contravene those standards as expressed in the recent amendment to 28 U.S.C. §455(a). As amended, that statute calls for the disqualification of a federal judicial official "in any proceeding in which his impartiality might reasonably be questioned." As respondent points out, the intent of this amendment was to substitute an objective standard for the subjective one employed by the former statute.

However, there is no indication that the substantive grounds for disqualification were broadened by the amendment. Since the courts applied the former statute to participation in the same or closely related cases which, as shown above, is not the situation here, we conclude that the new statute does not require Judge Berman's disqualification. Furthermore, even if the amendment was intended to broaden the grounds for disqualification, we find, based on the foregoing analysis, that respondent has not raised a reasonable question as to Judge Berman's impartiality in this matter. Accordingly,

It is ordered, That the aforesaid motion to disqualify Alvin L. Berman as administrative law judge in the above-captioned matter be, and it hereby is, denied.

Commissioner Thompson not participating.

IN THE MATTER OF

ROY D. HANSEN T/A ROY HANSEN MORTAGE COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2664. Complaint, May 13, 1975-Decision, May 13, 1975

Consent order requiring an Arlington, Va., loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Bernard Rowitz, Alice C. Kelleher* and *Thomas J. Keary.*

For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Roy D. Hansen, an individual, trading and doing business as Roy Hansen Mortgage Company, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Roy D. Hansen is an individual, trading and doing business as Roy Hansen Mortgage Company, with his principal office and place of business located at 2116 Wilson Blvd., Arlington, Va.

PAR. 2. Respondent is now, and for some time last past has been, engaged as a broker in the arranging and securing of loans for the general public.

PAR. 3. In the ordinary course and conduct of his business as aforesaid, respondent regularly arranges for the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of business as aforesaid, respondent's customers are provided with consumer credit cost disclosure statements.

By and through the use of the aforesaid consumer credit cost disclosures respondent:

1. Fails to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

2. Fails to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

3. Fails to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

4. Fails to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

5. Fails to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

6. Fails to identify each creditor, as "creditor" is defined by Section

226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

7. Fails to make full consumer credit cost disclosures before the transaction is consummated, as required by Section 226.8(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of the Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Roy D. Hansen is an individual, trading and doing business as Roy Hansen Mortgage Company with his office and principal place of business located at 2116 Wilson Blvd., Arlington, Va.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Roy D. Hansen, an individual, trading and doing business as Roy Hansen Mortgage Company, or under any other name or names, his successors and assigns, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement for the extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension or arrangement for the extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulatin Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

2. Failing to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

3. Failing to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

4. Failing to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

5. Failing to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

6. Failing to identify each creditor, as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

7. Failing to provide the borrower complete consumer credit cost disclosures before consummation of the transaction, as required by Section 226.8(a) of Regulation Z.

8. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondent prominently display no less than two signs on the premises which will clearly and conspicuously state that a customer must receive a complete copy of the consumer credit cost disclosures, as required by the Truth in Lending Act, in any transaction which is financed, before the transaction is consummated.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the arranging for the extension of consumer credit, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliations with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

VALLEY ACCEPTANCE CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2665. Complaint, May 13, 1975 - Decision, May 13, 1975

Consent order requiring a Roanoke, Va., loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Bernard Rowitz*, *Alice C. Kelleher* and *Thomas J. Keary*.

For the respondents: *Richard Lee Lawrence*, Roanoke, Va.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Valley Acceptance Corporation, a corporation, and Henry E. Wiesen, and Virginia C. Wiesen, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Valley Acceptance Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its principal office and place of business located at Colonial American Bank Bldg., Roanoke, Va.

Respondents Henry E. Wiesen, and Virginia C. Wiesen are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

All of the aforementioned respondents cooperate and act together in the carrying out of the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged as brokers in the arranging and securing of loans for the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

Par. 4. Subsequent to July 1, 1969, in the ordinary course of business as aforesaid respondents' customers are provided with consumer credit cost disclosure statements.

By and through the use of the aforesaid consumer credit cost disclosures respondents:

1. Fail to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.

2. Fail to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Fail to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Fail to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Fail to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Fail to disclose clearly the method of computing any unearned

portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Fail to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Fail to make full consumer credit cost disclosures before the transaction is consummated, as required by Section 226.8(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of the Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Valley Acceptance Corporation is a corporation organized, existing and doing business under and by virtue of the Commonwealth of Virginia, with its office and principal place of business located at Colonial American Bank Bldg., Roanoke, Va.

Respondents Henry E. Wiesen and Virginia C. Wiesen are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Valley Acceptance Corporation, a corporation, its successors and assigns, and its officers, and Henry E. Wiesen, and Virginia C. Wiesen, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement for the extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension or arrangement for the extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.

2. Failing to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Failing to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Failing to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Failing to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Failing to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Failing to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Failing to provide the borrower complete consumer credit cost disclosures before consummation of the transaction, as required by Section 226.8(a) of Regulation Z.

9. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondents prominently display no less than two signs on the premises which will clearly and conspicuously state that a customer must receive a complete copy of the consumer credit cost disclosures, as required by the Truth in Lending Act, in any transaction which is financed, before the transaction is consummated.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the arranging for the extension of consumer credit, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

TED P. SIMOPOULOS T/A TED SIMS REAL ESTATE

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2666. Complaint, May 13, 1975-Decision, May 13, 1975

Consent order requiring a Lynchburg, Va., loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Bernard Rowitz, Alice C. Kelleher* and *Thomas J. Keary.*

For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing Regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Ted P. Simopoulos, an individual, trading and doing business as Ted Sims Real Estate, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ted P. Simopoulos is an individual, trading and doing business as Ted Sims Real Estate, with his principal office and place of business located at 1111 Church St., Lynchburg, Virginia.

PAR. 2. Respondent is now, and for some time last past has been engaged as a broker in the arranging and securing of loans for the general public.

PAR. 3. In the ordinary course and conduct of his business as aforesaid, respondent regularly arranges for the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of business as aforesaid, respondent's customers are provided with consumer credit cost disclosure statements.

By and through the use of the aforesaid consumer credit cost disclosures respondent:

1. Fails to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.
2. Fails to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Fails to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Fails to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Fails to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Fails to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Fails to identify the broker as a creditor, as "creditor" is defined by Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Fails to make full consumer credit cost disclosures before the transaction is consummated, as required by Section 226.8(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of the Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Ted P. Simopoulos is an individual, trading and doing business as Ted Sims Real Estate, with his office and principal place of business located at 1111 Church St., Lynchburg, Va.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Ted P. Simopoulos, an individual, trading and doing business as Ted Sims Real Estate, or under any other name or names, his successors and assigns, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement for the extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension or arrangement for the extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.

2. Failing to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Failing to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Failing to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Failing to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Failing to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Failing to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Failing to provide the borrower complete consumer credit cost

disclosures before consummation of the transaction, as required by Section 226.8(a) of Regulation Z.

9. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondent prominently display no less than two signs on the premises which will clearly and conspicuously state that a customer must receive a complete copy of the consumer credit cost disclosures, as required by the Truth in Lending Act, in any transaction which is financed, before the transaction is consummated.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the arranging for the extension of consumer credit and that respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliations with a new business or employment. Such notice shall include respondent's current business addresses and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

EATON YALE & TOWNE, INC. AND ITS SUCCESSOR IN NAME, EATON CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8826. Complaint, Dec. 17, 1970-Decision, May 15, 1975

Consent order requiring a Cleveland, Ohio, manufacturer of engine valves and valve lifters, among other things to divest itself of the assets acquired in 1969, of the McQuay-Norris Manufacturing Co. within 24 months. The order further requires respondent to supply, for a period of two years, on reasonable terms and conditions, any or all requirements the divested firm may have for automotive engine valves, valve lifters, camshaft bearings, thermostats and tire valves.

Appearances

For the Commission: *K. Keith Thurman, James C. Egan, Jr.* and *James C. Hamill, Jr.*

For the respondent: *John T. Loughlin, Victor E. Grimm, Robert T. Johnson, Jr.* and *William R. Carney, Bell, Boyd, Lloyd, Haddad & Burns*, Chicago, Ill.

COMPLAINT

The Federal Trade Commission having reason to believe that Eaton Yale & Towne Inc., a corporation subject to the jurisdiction of the Commission, has acquired the stock of McQuay-Norris Manufacturing Co., a corporation, in violation of Section 7 of the Clayton Act (15 U.S.C. §18), hereby issues this Complaint, pursuant to Section 11 of that Act (15 U.S.C. §21), stating its charges in that respect as follows:

I. Definitions

1. For the purpose of this complaint, the following definitions shall apply:

(a) "Automotive valve train products" are defined as engine valves, valve springs, valve guides, valve lifters, valve seals, valve keepers, valve seat inserts, push rods, rocker arms and parts, roto caps, roto assemblies and camshafts.

(b) "Automotive engine parts" are valve train products, engine sleeve bearings, pistons and pins, piston rings, and water pumps.

(c) A "reboxer" is defined as a manufacturer of one or more lines of automotive parts who purchases for resale under its own brand, automotive parts that it does not manufacture. A reboxer competes at the manufacturers' functional level.

(d) The "independent aftermarket" is defined to include all sales by manufacturers of automotive parts direct to wholesalers or retailers for replacement use. It excludes sales by vehicle manufacturers or engine manufacturers directly to vehicle dealers.

II. Eaton Yale & Towne Inc.

2. Respondent Eaton Yale & Towne Inc., (hereafter "EYT"), is now, and was at the time of merger, an Ohio corporation with its principal office and place of business located at 100 Erieview Plaza, Cleveland, Ohio.

3. In 1968, EYT had sales of $889.8 million, and assets of $622.7 million. In that year it was the 111th largest industrial corporation in

the nation. In 1969, its sales exceeded $1 billion and assets increased to $735.5 million which made it the 110th largest industrial corporation.

4. EYT's four most important product lines, which contributed an aggregate of approximately 63 percent of net sales during 1968 are (a) Motor Vehicle Parts and Accessories (29 percent); (b) Industrial Trucks, Tractors, Trailers and Stackers (15 percent); (c) Miscellaneous Machinery (10 percent); and (d) Mechanical Power Transmission Equipment (9 percent).

5. Among the motor vehicle parts and accessories EYT manufactures are engine valves, hydraulic valve lifters and valve seat inserts. EYT is one of the nation's two largest producers of engine valves and valve lifters. It is one of only two companies manufacturing sodium filled engine valves in the United States. EYT's valve division is one of only four basic manufacturers of engine valves for the automotive replacement market (hereafter sometimes "aftermarket"), excluding engine manufacturers. The other three engine valve manufacturers sell directly in the independent aftermarket, whereas, prior to acquiring McQuay, EYT did not sell automotive valve train products directly in the independent aftermarket. EYT is also a substantial supplier of engine valves to the automotive original equipment market. In 1967, EYT shipped $27.8 million of engine valves, accounting for 34.4 percent of total industry shipments of engine valves for passenger cars, trucks, and buses. EYT's shipments in 1967 of engine valves for replacement use were in excess of $1.6 million, accounting for over 20 percent of such shipments.

6. EYT, through its Dole Valve Division, is the leading seller of automotive thermostats in the independent aftermarket, accounting for 23 percent of 1967 sales. EYT also sells several other product lines in the independent aftermarket including tire repair items, air conditioners and parts, and filler caps.

7. By virtue of its position as a substantial supplier of engine valves to the original equipment market, its reputation as a manufacturer of high quality engine parts, its financial resources, and its knowledge of the aftermarket gained through the sale of several other products in the independent aftermarket, EYT was, prior to Oct. 31, 1969, one of the most likely potential entrants into the sale of engine valves and other valve train products directly in the independent aftermarket.

8. By virtue of its position as a likely entrant into the sale of valve train products in the independent aftermarket, EYT was also one of the most likely potential entrants into the sale of automotive engine parts other than valve train products in the independent aftermarket.

9. At all times relevant herein, EYT sold and shipped its products

throughout the United States and was and is now engaged in commerce as "commerce" is defined in the Clayton Act.

III. McQuay-Norris Manufacturing Co.

10. Prior to its merger into EYT on Oct. 31, 1969, McQuay-Norris Manufacturing Co. (hereafter "McQuay") was a Delaware corporation with its principal office and place of business located at 2320 Marconi Av., St. Louis, Mo.

11. McQuay was engaged principally as a manufacturer and reboxer in the sale of engine, chassis and automatic transmission parts for automobiles, truck, tractors and industrial uses. Substantial sales were made to original equipment manufacturers, but the greater part of McQuay's sales were made in the independent aftermarket. In 1968, McQuay had sales of $32.9 million and assets of $22.1 million.

12. McQuay was a leading seller of engine parts in the independent aftermarket. In 1967 it sold $13.3 million of engine parts in the independent aftermarket. In that year it accounted for 10.7 percent of the sale of engine parts in the independent aftermarket and was the 5th largest seller of such parts in the independent aftermarket.

13. McQuay was a leading seller in the independent aftermarket of the 5 product lines which comprise the engine parts market. In 1967, McQuay's sales of valve train products in the aftermarket were $3.6 million, which represented approximately 6 percent of the total aftermarket sales of valve train products. In that year McQuay was the third largest seller of valve train products in the 1967 independent aftermarket. McQuay accounted for 11 percent of total valve train product sales in the independent aftermarket.

14. In 1967, McQuay was a substantial manufacturer and seller of automotive engine parts in the independent aftermarket. With sales of $1.7 million, it ranked 5th in the country in sales of piston rings; with sales of $3.9 million, 4th in the sale of engine sleeve bearings; with sales of $2.9 million, 3rd in the sale of water pumps; and with sales of $1.1 million, 5th in the sale of pistons and pins.

15. McQuay as a reboxer was a significant purchaser of automotive engine valves and valve lifters. In 1967, its purchases of automotive engine valves were approximately $1 million and valve lifters were approximately $.3 million. The purchases of automotive engine valves represented 12.3 percent of all shipments made by automotive engine valve manufacturers for replacement use.

16. At all times relevant herein McQuay sold and shipped its products throughout the United States and engaged in commerce as "commerce" is defined in the Clayton Act.

IV. Trade and Commerce

17. The aftermarket for automotive engine parts consists of two submarkets: sales by engine manufacturers to vehicle dealers and sales by engine manufacturers and other manufacturers or reboxers to distributors, wholesalers, rebuilders and direct buying retailers. Engine manufacturers sell replacement engine parts almost entirely to vehicle dealers. Reboxers and manufacturers of engine parts, other than engine manufacturers, account for almost all the sales in the independent aftermarket and do not sell any engine parts directly to vehicle dealers.

18. The sale of automotive engine parts in the independent aftermarket is substantial, with 1967 shipments of such parts amounting to $124.4 million.

19. Sales of each of the product lines which comprise the sale of engine parts in the independent aftermarket are also substantial. In 1967, sales in the independent aftermarket of valve train products were in excess of $32 million, sales of piston rings were $30.6 million, sales of engine sleeve bearings were $33.2 million, sales of water pumps were $15.6 million and sales of pistons and pins were $14.2 million.

20. Sales of each of the five automotive engine parts product lines in the aftermarket exceeded sales of each such product lines in the independent aftermarket. In 1967, total sales of valve train products in the entire aftermarket were in excess of $58.5 million compared to sales in excess of $32 million in the independent aftermarket.

21. Concentration in the sale of engine parts in the independent aftermarket is high. In 1967, the 5 largest sellers of engine parts in the independent aftermarket accounted for 69 percent of total sales in that market.

22. Concentration within each of the five product lines comprising the engine parts market is also high. For example, in 1967, the four largest marketers of valve train products accounted for 64 percent of independent aftermarket sales of such products.

23. Entry into the sale of engine parts in the independent aftermarket of any of the five product lines comprising the engine parts market is difficult. A successful manufacturer or reboxer must possess a reputation as a manufacturer of high quality engine parts, must have ample financial resources and must have knowledge of how to sell automotive parts in the independent aftermarket.

24. Engine valves represent a significant portion of replacement engine parts sales. In 1967 shipments of engine valves for replacement use totalled $8.1 million, representing 10 percent of the $80.9 million total shipments of engine valves for passenger cars, trucks and buses.

25. Concentration in the production of engine valves is very high. In 1967, the two largest producers of engine valves accounted for over 80 percent of shipments both for replacement use and total shipments.

26. The number of manufacturers and reboxers of engine valves has remained constant for over 15 years, except that one company recently discontinued producing engine valves in the United States.

27. Engine valves represent a necessary product in the sale of engine parts in the independent aftermarket. Engine valves account for approximately 50 percent of total independent aftermarket sales of valve train products, with another 25 percent of the independent aftermarket sales of valve train products being accounted for by valve lifters. Without selling engine valves it is most difficult to compete successfully in the sale of engine parts or valve train products in the independent aftermarket.

V. The Transaction

28. On or about October 31, 1969, EYT acquired McQuay by merger of McQuay into EYT through an exchange for each share of McQuay's common stock of 0.8 common share of EYT. At the time of the acquisition of EYT stock exchanged for McQuay was valued at approximately $25 million.

VI. Effect of the Acquisition

29. The effects of the acquisition of McQuay by EYT may be substantially to lessen competition or tend to create a monopoly in the sale of automotive engine parts, automotive engine valves and other valve train products throughout the United States in violation of Section 7 of the Clayton Act, as amended, in the following ways among others:

(a) Substantial potential competition between EYT and McQuay in the sale of automotive engine parts in the independent aftermarket has been eliminated.

(b) Substantial potential competition between EYT and McQuay in the sale of automotive valve train products in the independent aftermarket has been eliminated.

(c) Entry of new manufacturers or reboxers into the sale of automotive engine parts in the independent aftermarket may be inhibited or prevented.

(d) Entry of new manufacturers or reboxers into the sale of automotive valve train products in the independent aftermarket may be inhibited or prevented.

(e) Competing manufacturers of automotive engine valves may be foreclosed from access to a substantial segment of the independent aftermarket and may thereby be deprived of a fair opportunity to compete.

(f) Competing reboxers of automotive engine valves may be foreclosed from access to a substantial source of supply of engine valves, especially in periods of short supply.

(g) Competing reboxers of automotive engine valves may be disadvantaged in competing in the sale of automotive engine parts in the independent aftermarket by the potential foreclosure of access to a substantial source of supply of automotive engine valves.

VII. The Violation Charged

30. The acquisition of McQuay by EYT constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. Section 18).

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereto with violation of Section 7 of the Clayton Act, as amended, and the respondent having been served with a copy of that complaint, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter withdrawn this matter from adjudication in accordance with Section 2.34(d) of its rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Eaton Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located in the city of Cleveland, State of Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Eaton Corporation, formerly known as Eaton Yale & Towne, Inc., (hereinafter "Eaton") within a period not exceeding twenty-four (24) months from the effective date of this order, shall divest, by sale, or by public offering or spin-off of the stock of a new corporation formed for such purpose, subject to prior approval of the Federal Trade Commission, all assets, properties, rights and privileges, tangible and intangible, including but not limited to, all plants, equipment, machinery, inventory, customer lists, trade names, trademarks and good will, acquired by Eaton as a result of its merger with McQuay-Norris Manufacturing Co., (hereinafter "McQuay") together with all additions and improvements to such assets and properties, but excluding:

(A) The plant, machinery, equipment, and other fixed assets and the business of the former Dura-Bond operation of McQuay, which is now a part of the special products division of Eaton; and

(B) The plant, machinery, equipment, and other fixed assets and the business of the former electric products division of McQuay, which is now a part of the electric products division of Eaton.

In the event that a new corporation is established as provided herein, respondent shall make available to such new corporation adequate administrative, sales and service personnel to carry on the business to be transferred to the new corporation.

II

It is further ordered, That none of the assets, properties, rights or privileges to be divested, as described in the foregoing paragraph of this order, shall be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, respondent or any of respondent's subsidiary or affiliate corporations, or anyone who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Eaton, or to anyone who is not approved in advance by the Federal Trade Commission.

III

If respondent divests the assets, properties, rights and privileges, described in Paragragh I of this order, to a new corporation or corporations, the stock of each of which is wholly owned by the Eaton Corporation, and if respondent then distributes all the stock in said corporation or corporations to the stockholders of the Eaton Corporation, in proportion to their holdings of the Eaton Corporation stock, then Paragraph II of this order shall be inapplicable, and the following Paragraphs IV and V shall take force and effect in its stead.

IV

No person who is an officer, director, or executive employee of the Eaton Corporation, or who owns or controls, directly or indirectly, more than 1 percent of the stock of The Eaton Corporation, shall be an officer, director or executive employee of any new corporation or corporations described in Paragraph III, or shall own or control, directly or indirectly, more than 1 percent of the stock of any new corporation or corporations described in Paragraph III.

V

Any person who must sell or dispose of a stock interest in the Eaton Corporation or the new corporation or corporations, described in Paragraph III, in order to comply with Paragraph IV of this order may do so within six (6) months after the date on which distribution of the stock of the said corporation or corporations is made to stockholders of the Eaton Corporation.

VI

It is further ordered, That, pending divestiture, respondent shall not make or permit any deterioration in any of the plants, machinery, buildings, equipment or other property or assets of the company to be divested which may impair its present capacity or market value.

VII

It is further ordered, That respondent shall grant to the purchaser of the assets, or to the new company referred to in Part I of this order, the right to purchase, on reasonable terms and conditions no less favorable than those offered to any other customers performing the same distribution functions in the automotive aftermarket, for a period of two (2) years from the date of divestiture as provided in Part I of this order, or for any part of same two (2) year period, all or any part of the requirements of said purchaser of automotive engine valves, valve lifters, camshaft bearings, thermostats and tire valves, subject to the capacity of respondent to fulfill such requirements.

VIII

It is further ordered, That, pending divestiture, and for five (5) years from the date of divestiture as provided in Part I of this order, respondent shall not acquire, directly or indirectly, without the prior approval of the Commission, the share capital or assets (other than products acquired for use or resale in the ordinary course of respondent's business, or other than the acquisition by respondent of the share capital or assets of any corporation not organized in the United States of which respondent owns more than 50 percent of the issued and outstanding share capital as of the effective date of this order) of any corporation which operates an automotive aftermarket distribution organization with annual sales of automotive engine parts within the automotive aftermarket in the United States in excess of $2,000,000; provided that nothing in this paragraph shall prohibit respondent from acquiring the share capital or assets of any corporation engaged at the time in the importation of foreign automotive engine parts into the United States.

No acquisition made by respondent shall be deemed immune or exempt from the antitrust laws by reason of anything contained in this order.

IX

It is further ordered, That respondent shall, within six (6) months after the effective date of this order, and every six (6) months thereafter, until respondent has fully complied with Part I of this order, submit to the Federal Trade Commission a detailed written report of its actions, plans and progress in complying with the provisions of Part I of the order.

With respect to Part VIII of this order, respondent shall, on the first anniversary date of the divestiture provided for in Part I of this order and on each anniversary date thereafter, to and including the fifth anniversary date, submit a report, in writing, setting forth in detail the manner and form in which respondent intends to comply, is complying and has complied with Part VIII of this order.

X

It is further ordered, That respondent notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of the order, such as dissolution, assignments or sale resulting in the emergence of a successor corporation or the creation or dissolution of subsidiaries.

IN THE MATTER OF

WARNER-LAMBERT COMPANY

Docket 8850. Order, May 22, 1975

Complaint counsel's motion for corrections in the official transcript of the oral argument granted; and procedures clarified for reception of motions to correct transcript.

ORDER CORRECTING TRANSCRIPT AND CLARIFYING PROCEDURES FOR RECEPTION OF MOTIONS TO CORRECT TRANSCRIPT

This matter is before the Commission upon the Motion of Counsel Supporting the Complaint, filed Jan. 14, 1975, requesting certain corrections in the official transcript of the oral argument in this matter, held Dec. 18, 1974. Said motion having been served on respondent Warner-Lambert Company on Jan. 17, 1975, and respondent having filed no timely answer thereto; *It is ordered*, That the said motion be granted and that a copy of said motion be attached to the official copy of the transcript of the oral argument to provide a record of the corrections adopted.

Henceforth, the Commission will entertain only joint motions of the parties requesting corrections in the transcript of oral argument, except that the Commission will receive a unilateral motion which recites that the parties have made a good faith effort to stipulate to the desired corrections but have been unable to do so. If the parties agree in part and disagree in part, they should file a joint motion incorporating the extent of their agreement and, if desired, separate motions requesting those corrections to which they have been unable to agree.

IN THE MATTER OF

FILMDEX CHEX SYSTEM INCORPORATED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FAIR CREDIT REPORTING ACTS

Docket C-2669. Complaint, May 16, 1975-Decision, May 16, 1975

Consent order requiring a Centreville, Va., credit reporting company, among other things to cease furnishing, in violation of the Fair Credit Reporting Act; such information as has been gathered by respondents on consumers to persons without a permissible purpose.

Appearances

For the Commission: *Bernard Rowitz* and *Irvin E. Abrams.*

For the respondents: *John R. Foley, Foley & Foley,* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and the Fair Credit Reporting Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Filmdex Chex System Incorporated, a corporation, and Joseph E. Slattery, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Filmdex Chex System Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 15500 Lee Hwy., Centreville, Va.

Respondent Joseph E. Slattery is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Subsequent to Apr. 25, 1971, in the ordinary course and conduct of their business, respondents have compiled and published lists containing, among other things, the names and addresses of consumers, together with statements or indications that such consumers have outstanding unpaid bills, or with statements or indications that such consumers have issued forged checks, checks drawn upon nonexistent accounts, or checks which have been returned by the drawee bank because of insufficient funds or other reasons.

The information contained in the aforesaid lists concerning consumers whose names and addresses appear therein, bears on said consumers' credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics and/or mode of living. Therefore, each of the aforesaid lists constitutes a series of consumer reports as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act.

Respondents are, and have been, for monetary fee, regularly engaged in the practice of assembling such information on consumers for the purpose of furnishing such lists to third parties, and regularly use a means or facility of interstate commerce for the purpose of preparing and/or furnishing said lists. Therefore, respondents are a consumer reporting agency as "consumer reporting agency" is defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 3. At the time respondents furnish the aforesaid consumer reports in list form, respondents do not have reason to believe that each person to whom the consumer reports are furnished has a legitimate business need for the information in each report in connection with a business transaction involving each consumer reported upon, nor do respondents have reason to believe that each recipient otherwise intends to use the information contained in each report for a purpose set forth in Section 604 of the Fair Credit Reporting Act. Further, the furnishing of such consumer reports is neither in response to a court order nor in accordance with the written instructions of each consumer to whom the reports relate.

Therefore, respondents, in the ordinary course and conduct of their business, as aforesaid, furnish consumer reports to persons, as "person" is defined in Section 603(b) of the Fair Credit Reporting Act, who do not have a legitimate business need or other permissible purpose to receive the consumer reports furnished to them, as required by Section 604(e) of the Act.

By furnishing consumer reports as described above, respondents have violated, and are violating, Section 604 of the Fair Credit Reporting Act.

PAR. 4. By and through the acts and practices described in Paragraph Three above, respondents have failed to maintain reasonable procedures to limit the furnishing of consumer reports to the purposes listed under Section 604 of the Fair Credit Reporting Act, and have furnished consumer reports to persons under circumstances in which there are reasonable grounds for believing that such reports will not be used for a purpose listed in Section 604 of such Act. Therefore, respondents have violated, and are violating, Section 607(a) of the Fair Credit Reporting Act.

PAR. 5. The acts and practices set forth in Paragraphs Three and Four above, were, and are, in violation of the Fair Credit Reporting Act and pursuant to Section 621(a) of that Act, said acts and practices constitute unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Washington, D.C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, and the Fair Credit Reporting Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Filmdex Chex System Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 15500 Lee Hwy., Centreville, Va.

Respondent Joseph E. Slattery is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Filmdex Chex System Incorporated, a corporation, its successors and assigns, and its officers, and Joseph E. Slattery, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with collecting, preparation, assembling and/or furnishing of consumer reports as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act (Pub.L. 91-508, 15 U.S.C. §1601, *et seq.*), shall forthwith cease and desist from:

1. Furnishing any consumer report to any person, unless such report is furnished:

a. In response to the order of a court having jurisdiction to issue such order; or

b. In accordance with the written instructions of the consumer to whom the report relates; or

c. To a person which respondents then has reason to believe intends, at the time the information is furnished, to use the information:

(1) In connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(2) For employment purposes; or

(3) In connection with the underwriting of insurance involving the consumer; or

(4) In connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(5) In connection with a business transaction involving each consumer, reported upon.

2. Furnishing consumer reports in list form, unless the identity of the consumer to whom the information relates is not disclosed on such list, and cannot be determined without the use of additional information and identification to be provided by the consumer. Such additional information and identification to be provided at the time of the transaction with the user.

3. Failing to require prospective users of consumer reports to certify the purposes for which the information in such reports is

sought, and that it will be used for no other purpose, in accordance with Section 607 of the Fair Credit Reporting Act.

4. Furnishing consumer reports to any user or prospective user of such reports who does not first provide the identification and the certification of purpose for which information in such reports is sought, as required by Section 607(a) of the Fair Credit Reporting Act.

5. Failing to maintain reasonable procedures necessary to limit the furnishing of consumer reports to the purpose listed under Section 604 of the Act, as provided by Section 607 of the Act.

6. Failing to include the following statement on the face sheet of series of consumer reports published and distributed by respondents with such conspicuousness and clarity as is likely to be read and understood by users of such consumer reports:

> a. Information contained within these series of consumer reports will be used exclusively by the designated recipient or his representatives for the following permissible purposes and no other:
>
> (1) In connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
>
> (2) In connection with employment purposes; or
>
> (3) In connection with the underwriting of insurance involving the consumer; or
>
> (4) In connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
>
> (5) In connection with a legitimate business need for the information in connection with a business transaction involving the consumer.
>
> b. It is understood by the users of these series of consumer reports that Pub. L. 91-508, Section 619, states "Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than $5,000 or imprisoned not more than one year, or both."

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the preparation and/or furnishing of consumer reports, and that respondents secure a signed statement acknowledging receipt of said order from all such personnel.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries or any other change in the corporation which may effect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

IN THE MATTER OF

KOSCOT INTERPLANETARY, INC., ET AL.*

Docket 8888. Order, May 22, 1975

Publication of initial decision pursuant to established procedures directed.

ORDER DIRECTING PUBLICATION OF INITIAL DECISION

On Mar. 20, 1975, the administrative law judge certified to the Commission the question of whether, and in what form, the initial decision in this matter should be published, inasmuch as it contains references to testimony which we had been directed to keep *in camera* by Judge Hodges of the United States District Court for the Middle District of Florida. At the direction of the Commission, the General Counsel sought modification of the Court's order and, by Order of May 9, 1975, the Court granted leave to publish the initial decision in full. This renders moot complaint counsel's motion of Apr. 7, 1975, requesting, *inter alia, in camera* service of the initial decision pending the Commission's decision on the law judge's certification. Accordingly,

It is ordered, That the initial decision in the above-captioned matter be published pursuant to the Commission's established procedures.

IN THE MATTER OF

ENCYCLOPAEDIA BRITANNICA, INC., ET AL.

Docket 8908. Order, May 22, 1975

Denial of motion by respondents or postponement of oral argument until they obtain documents currently being sought under the Freedom of Information Act.

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* For appearances, see p. 19, herein.

Appearances

For the Commission: *Paul L. Chassy, Lemuel Dowdy & Donald L. Bachman.*

For the respondents: *Mayer, Brown & Platt,* Chicago, Ill.

ORDER DENYING MOTION TO POSTPONE ORAL ARGUMENT

By motion filed May 16, 1975, respondents have moved for a postponement of oral argument in this matter until they are able to obtain certain documents which they are currently seeking from the Commission under the Freedom of Information Act, 5 U.S.C. § 552, as amended. Respondents contend that, without these documents, they will be unable to anticipate all of the arguments which complaint counsel may raise in oral argument.

Respondents have had full opportunity for discovery in this matter, and, in preparing for oral argument, they have had complete access to the record in this case. Therefore, the Commission finds respondents' contention too speculative a ground on which to postpone the argument, since it assumes that respondents will ultimately obtain the documents and that the documents will contain information necessary to a resolution of the issues of this case. Accordingly,

It is ordered, That the aforesaid motion be, and it hereby is, denied.

IN THE MATTER OF

SOUNDTRACK CHEVELL INDUSTRIES, INC., ET AL.[*]

Docket 8998. Order, May 22, 1975

Request for appointed counsel granted and general counsel directed to secure adequate legal representation for corporate and two individual respondents.

ORDER GRANTING REQUEST FOR APPOINTED COUNSEL

By order of May 5, 1975, the administrative law judge certified to the Commission his findings of fact with respect to the request of respondents William and Helen Temple and Soundtrack Chevell Industries, Inc. that an attorney be appointed to represent them in this matter. Where a respondent is unable to afford adequate legal representation, the Commission will appoint counsel for him pursuant to the procedures outlined in 35 F.R. 18998 (1970). Based upon the law judge's findings as to: (1) the above-named respondents' financial situations, and (2) the probable costs of presenting a defense to the charges against them, we have concluded that said respondents are entitled to appointed counsel. Accordingly,

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[*] For appearances, see p. 404, herein.

It is ordered, That the general counsel for the Commission take all necessary and appropriate measures to secure adequate legal representation for the above-named respondents.

Commissioners Dixon and Thompson would have closed this matter for lack of public interest in further proceedings.

IN THE MATTER OF

CUBCO, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2670. Complaint, May 22, 1975-Decision, May 22, 1975

Consent order requiring a Nutley, N.J., manufacturer and distributor of ski bindings and related items, among other things to cease anticompetitive practices having the effect of enforcing and fixing the dealers' resale prices for certain of respondents' products.

Appearances

For the Commission: *David W. DiNardi*

For the Respondents: *Richard F. McMahon, Lafferty, Rowe, McMahon, McKeon*, Newark, N.J.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Cubco, Inc., a corporation, and Mitchell H. Cubberley, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U.S.C. §45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Cubco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located on Baltimore St., Nutley, N.J.

Respondent Mitchell H. Cubberley is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents have been and are now engaged in the manufacture, sale and distribution of Cubco ski bindings and related items, hereinafter referred to as said products. Respondents' products are subsequently distributed and sold to authorized dealers throughout the United States for resale to the general public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents have been and are now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that respondents have sold and caused and now cause said products to be shipped from the state in which they are manufactured or warehoused to other States of the United States for resale and distribution through authorized dealers.

PAR. 4. Except to the extent that competition has been hampered or restrained as set forth in this complaint, respondents have been and are now in competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of said products.

PAR. 5. Respondents, in combination, agreement or understanding with certain of their authorized dealers, or with the cooperation or acquiesence of other of their dealers, have for the last several years been engaged in a planned course of action to fix, establish and maintain certain specified uniform prices at which said products are resold. In furtherance of said planned course of action, respondents have for the past several years engaged in the following acts and practices, among others:

(a) Regularly furnishing their dealers with price lists and necessary supplements thereto containing certain resale or retail prices;

(b) Establishing agreements, understandings, arrangements with their dealers, one or more of whom are located in states which do not have fair trade laws, as a condition precedent to the granting of a dealership, that such dealers will maintain certain resale or retail prices;

(c) Informing their dealers, by direct and indirect means, that respondents expect and require such dealers to maintain and enforce certain resale or retail prices, or such dealerships will be terminated.

(d) Requiring their dealers to agree not to sell or otherwise supply or furnish their products to anyone who is not an authorized dealer of the respondents;

(e) Soliciting and obtaining from their dealers, cooperation and assistance in identifying and reporting any dealer who advertises, or offers to sell, or sells said products at prices lower than certain resale or retail prices; and

(f) Directing their salesmen, representatives and other employees to secure and report information identifying any dealer who fails to adhere to and maintain certain resale or retail prices.

PAR. 6. By means of such acts and practices, including but not limited to the foregoing, respondents, in combination, agreement, or understanding with certain of their authorized dealers and with the acquiesence of other authorized dealers, have established, maintained and pursued a planned course of action to fix and maintain certain resale or retail prices at which said products will be resold.

PAR. 7. The aforementioned acts and practices of respondents have been and are now having the effect of hampering and restraining competition in the resale and distribution of said products, and constitute unfair methods of competition in commerce, all in derogation of the public interest and in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order;

1. Respondent Cubco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 20 Baltimore St., Nutley, N.J.

Respondent Mitchell H. Cubberley is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I. *It is ordered*, That respondents Cubco, Inc., a corporation, its successors and assigns, and its officers, and Mitchell H. Cubberley, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, distribution, offering for sale or sale of ski bindings, ski equipment and related items or any other product (hereinafter referred to in this order as "said products") in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Establishing, maintaining or enforcing any contract, agreement, understanding or arrangement fixing, establishing, maintaining, controlling, influencing or enforcing in any way or to any extent, directly or indirectly, the price at which any of said products is advertised, sold or offered for sale at retail.

B. Requiring any dealer or prospective dealer to enter into an oral or written agreement or understanding that such dealer or prospective dealer will maintain any resale or retail price for any of said products as a condition of buying any of said products.

C. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer, person or firm who does not adhere to any resale or retail price for any of said products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

D. Directing or requiring any of respondents' salesmen, or any other agent, representative, or employee, directly or indirectly, to report any dealer who does not adhere to any resale or retail price for any of said products, or to act on such reports by refusing or threatening to refuse sales to dealers so reported.

E. Refusing or threatening to refuse any sales to any dealer or prospective dealer, either directly or indirectly, or threatening to cancel or terminate, or cancelling or terminating any dealer or prospective dealer because of any resale or retail price observed, maintained, or advertised by the dealer or prospective dealer for any of said products.

F. Suggesting, for three (3) years from the date on which this order becomes final, any resale price whatsoever for any of said products, by price list, discount schedule, invoicing procedure, pre-pricing of commodities or their containers, or by any other means, to any reseller whose resale prices are not or cannot lawfully be controlled by respondents in the manner prescribed by law and this order.

G. Requiring, from any dealer charged with price cutting or failure to adhere to any resale or retail price, a promise or assurance to adhere to any resale or retail price for any of said products as a condition precedent to any future sales to said dealer.

H. Publishing, disseminating or circulating any price list, price book, price tag, advertising or promotional material, or other document indicating any resale or retail price without stating on each page of such list, book, tag, advertising or promotional material or other document that the price is suggested or approximate.

I. Requiring or inducing by any means, any dealer or prospective dealer to refrain, or to agree to refrain from reselling any of said products to any other dealer or distributor.

Provided, however, Nothing hereinabove shall be construed to waive, limit or otherwise affect the right of respondents to enter into, establish, maintain and enforce in any lawful manner any price maintenance agreement excepted from the provisions of Section 5 of the Federal Trade Commission Act by virtue of the McGuire Act amendments to said Act.

II. *It is further ordered*, That the respondent corporation herein shall within sixty (60) days after service upon it of this order, mail a copy of this order to each of its dealers in the Commonwealth of Puerto Rico, the District of Columbia, and in those states which now, or at any time in the future, do not permit fair trade contracts, and, during the five (5) year period of time following the date of service of this order, to all future dealers in these jurisdictions at the time said dealers are opened as accounts, under cover of the letter annexed hereto as Exhibit A, and furnish the Commission proof of the mailing thereof.

III. *It is further ordered*, That the respondent corporation herein shall forthwith distribute a copy of this order to each of its operating divisions and to all of its sales personnel and shall instruct each sales person employed by it now or in the future to read this order and to be familiar with its provisions.

IV. *It is further ordered*, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

V. *It is further ordered*, That the respondents herein for a period of five (5) years from the date of this signing establish and maintain a file of all records referring or relating to respondents' refusal to sell said products to any dealer, which file shall contain a record of a communication to each such dealer explaining respondents' refusal to sell, and which file will be made available for Commission inspection on reasonable notice; and, annually, for a period of five (5) years from the date hereof, submit a report to the Commission's Boston Regional Office listing the names and addresses of all dealers with whom respondents have refused to deal over the preceding year, a description of the reason for the refusal and the date of the refusal.

VI. *It is further ordered*, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

VII. *It is further ordered*, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

EXHIBIT A

(Letterhead of Cubco, Inc.)

Dear Dealer:

Cubco, Inc. has entered into an agreement with the Federal Trade Commission relating to the distributional activities and pricing policy of Cubco, Inc. A copy of the consent order entered into pursuant to that agreement is enclosed herewith.

Cubco, Inc. has entered into this agreement solely for the purpose of settling a dispute with the Commission, and the agreement and consent order is not to be construed as an admission by Cubco, Inc. that it has violated any of the laws administered by the Commission, or that any of the allegations in the complaint are true and correct. Instead, the order merely relates to the activities of Cubco, Inc. in the future.

In order that you may readily understand the terms of the consent order, we have set forth the essentials of the agreement with the Commission, although you must realize that the consent order itself is controlling rather than the following explanation of its provisions:

(1) Our dealers in your area are free to set their own retail or resale prices for our products.

(2) Cubco, Inc. will not solicit, invite or encourage dealers, or any other persons to report any dealer in your area not following any retail or resale price for any of said products, and, furthermore, will not act on any such reports sent to it.

(3) Cubco, Inc. will not require or induce its dealers in your area to refrain from advertising said products at any price or from selling or offering said products at any price to any person.

Sincerely yours,

Mitchell H. Cubberley
President

Enclosure

IN THE MATTER OF

CIRCULATION BUILDERS, INC., ET AL.

Docket 9004. Order, May 27, 1975

Denial of complaint counsel's motion to amend notice order in complaint to indicate possibility that consumer redress may be sought.

Appearances

For the Commission: *Ralph E. Stone* and *Paul D. Hodge*.
For the respondents: *Stephen M. Koolpe*, Mill Valley, Calif.

ORDER DENYING MOTION TO AMEND NOTICE ORDER

By order of Apr. 28, 1975, the administrative law judge certified to the Commission complaint counsel's motion to amend the notice order accompanying the complaint in this matter to indicate the possibility that the Commission may seek consumer redress against respondents pursuant to Section 206 of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. While complaint counsel is generally free in Section 5 actions to ask for relief over and beyond that described in the notice order, if any, consumer redress under the Magnuson-Moss Act for acts or practices that occurred prior to its enactment is permitted by statute only where the Commission's intent to seek such relief is set out in the complaint or notice order. The law judge has accordingly certified complaint counsel's motion to amend to the Commission.

No information was presented to the Commission at the time this complaint was issued as to why consumer redress should be sought and none is now offered. Accordingly, *It is ordered*, That the aforesaid motion to amend the notice order in this matter be, and it hereby is, denied.

IN THE MATTER OF

ATLANTIC INDUSTRIES, INC. T/A ATLANTIC PORTRAIT PLAN, ETC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8941. Complaint, Oct. 31, 1973-Decision, May 28, 1975

Consent order requiring a Miami, Fla., marketer of a photographic enlargement plan and three wholly-owned subsidiaries, among other things to cease using deceptive means to sell its photographic enlargement plan and to collect accounts.

Appearances

For the Commission: *Edward J. Carnot* and *W. Roland Campbell.*
For the respondents: *Hogan & Hartson*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Atlantic Industries, Inc., a corporation trading as Atlantic Portrait Plan and Atlantic Film Club, International Baby Care, Inc., Atlantic International Distributors, Inc., a corporation trading as Amalgamated Credit and Collection Bureau, National Direct Corporation, a corporation trading as National Advertised Products and International Album Plan, Jeffrey J. Weiss and Martin Osman, individually and as officers of said corporations, Lawrence Hahn, individually and as an officer of Atlantic Industries, Inc., and Richard S. Labovitz, individually and as an officer of International Baby Care, Inc. and Atlantic International Distributors, Inc., hereinafter referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Atlantic Industries, Inc., trading as Atlantic Portrait Plan, and Atlantic Film Club, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 720 N.W. 27th Ave., Miami, Fla.

Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of photographs, photograph albums, photograph enlargements, photograph certificates, film and other merchandise to the public.

Trading as Atlantic Portrait Plan, respondents' primary effort is to sell a photograph enlargement plan. Under the plan, the customer is entitled to have a specified number of enlargements developed by respondents over a ten-year period. The customer pays a lump sum, often on credit, for the plan and receives a book of coupons which are redeemable for the enlargements. Said products are sold chiefly by door-to-door salesmen.

Respondent, trading as Atlantic Film Club, operates a film processing service.

PAR. 2. Respondent International Baby Care, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business at 720 N.W. 27th Ave., Miami, Fla. Respondent International Baby Care, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of baby furniture products to the public.

PAR. 3. Respondent Atlantic International Distributors, Inc., trading as Amalgamated Credit and Collection Bureau, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida. The corporate address is 720 N.W. 27th Ave., Miami, Fla. Respondent Atlantic International Distributors, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

Respondent Atlantic International Distributors, Inc. is now and for some time last past has been engaged in the collection of delinquent accounts for respondents Atlantic Industries, Inc. and International Baby Care, Inc.

PAR. 4. Respondent National Direct Corporation, trading as National Advertised Products and International Album Plan, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 720 N.W. 27th Ave., Miami, Fla. Respondent National Direct Distributors, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of photographs, photographic albums, photograph enlargements, photograph certificates, film and other merchandise to the public.

Trading as National Advertised Products, respondents' primary effort is to sell a photograph enlargement plan. Under the plan, the customer is entitled to have a specific number of enlargements developed by respondents. The customer pays a lump sum, often on credit, for the plan and receives a book of coupons which are redeemable for the enlargements. Said products are sold chiefly by door-to-door salesmen.

Trading as International Album Plan, respondents' primary effort is to sell a photograph enlargement plan. Under the plan, the customer is entitled to have a specific number of enlargements developed by respondents. The customer pays a lump sum, often on credit, for the plan and receives a book of coupons which are redeemable for the enlargements. Said products are sold chiefly by door-to-door salesmen.

PAR. 5. Respondents Jeffrey J. Weiss and Martin Osman are officers and directors of the four corporate respondents. Said individual respondents formulate, direct, and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. The business address of the individual respondents is 720 N.W. 27th Ave., Miami, Fla.

Respondent Lawrence Hahn is a director of the four corporate respondents and an officer of respondent Atlantic Industries, Inc. In such positions, the respondent cooperates with the other individual respondents in formulating, directing, or controlling the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. The business address of respondent Hahn is 2285 Peachtree Rd., N.W., Atlanta, Ga.

PAR. 6. Respondent Richard S. Labovitz is an officer of the corporate respondents International Baby Care, Inc. and Atlantic International Distributors, Inc. and as such cooperates with the other individual respondents in formulating, directing, and controlling the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. The business address of respondent Labovitz is 720 N.W. 27th Ave., Miami, Fla.

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents and in the collection of delinquent accounts.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Four, Five and Seven hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 8. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused their said photographs, photograph albums, photograph enlargements, photograph certificates, film and other merchandise to be sold in various States of the United States, and when sold, to be shipped from their place of business in the State of Florida to purchasers thereof located in the various States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 9. In the course and conduct of their business and for the purpose of inducing the purchase of their merchandise, respondents, respondents' agents, representatives, and employees have made and are now making numerous statements and representations directly or by implication:

1. That customers will receive a free prize, gift, or bonus, namely a photograph album, with the purchase of the photograph enlargement plan.
2. That certain but not all prospective customers will be offered the opportunity to purchase the plan at a "special" or "reduced" price and that those prospective customers not offered the "special" or "reduced" price must pay a higher price.
3. That the "special" or "reduced" price is below respondents' established regular retail price for the plan.
4. That the "special" or "reduced" price is an "at cost" price which includes only the cost to respondents of materials needed to print and develop the enlargements.
5. That in order to purchase the plan at the "special" or "reduced" price, the prospective customer must agree to display the photograph album in his home.
6. That the special price is being offered for the purpose of advertising and promoting respondents' product.

PAR. 10. In truth and in fact:

1. The album is not free. Its cost is included in the cost of the plan.
2. Every prospective customer is afforded the opportunity to purchase the plan at the "special" or "reduced" price and no customer has to pay any higher price.
3. The "special" or "reduced" price is not below respondents'

established regular retail price for the plan. Respondents have never offered nor sold the plan for any price higher than the so-called "special" or "reduced" price.

4. The so-called "special" or "reduced" price is not an "at cost" price. The cost of the plan includes more than the cost to respondents of materials needed to print and develop the enlargements.

5. The prospective customers agreement to display the photograph album is not a prerequisite to respondents selling the plan to the customer at the so-called "special" or "reduced" price.

6. Respondents' offer is made for the purpose of realizing a profit on the sale and not for the purpose of advertising or promoting their portrait plan.

Therefore, the statements and representations set forth in Paragraph Nine are misleading and deceptive.

PAR. 11. In the further course and conduct of their business, respondents' agents, representatives, and employees represent directly or by implication that single enlargements are regularly sold by respondents for $7 each. Using $7 to demonstrate value, respondents further represent:

1. That the 100 coupon plan which has a base selling price of $189.95 is valued at over $700.

2. That the 90 coupon plan which has a base selling price of $149.95 is valued at over $630.

3. That the 60 coupon plan which has a base selling price of $89.95 is valued at over $420.

4. That customers will save the difference between the value of the plan and the base selling price.

PAR. 12. By and through the use of the statements set out in Paragraph Eleven above, and others of similar import and meaning but not expressly set out herein, respondents have represented, and are now representing that on a regular basis for a reasonably substantial period of time in the recent regular course of their business, single enlargements have been sold for $7 and further that $7 per enlargement would be a fair and accurate amount to use in determining the value of respondents' plan.

PAR. 13. In truth and in fact respondents have not sold single enlargements for $7 or any other price on a regular basis for a reasonably substantial period of time in the recent regular course of their business. Therefore, any demonstration of value or savings based on the $7 amount such as those described in Paragraph Eleven above would be false and misleading.

In addition, when demonstrating savings to customers, respondents neglect to add to the base price of the plan an amount equal to seventy-five cents per enlargement which respondents charge to cover mailing and handling. Respondents failure to include this extra charge is deceptive and misleading because such failure results in an inflation of the amount a customer might save by purchasing the plan.

PAR. 14. In the course and conduct of respondents' operations of the film processing service and for the purpose of inducing the purchase of their developing and printing services, respondents, respondents' agents, representatives and employees have made, and are now making statements and representations to customers that customers will receive a fresh roll of Kodak film FREE with each roll of film developed or printed by respondents. The free film has been offered by respondents continuously for a period of at least two years.

PAR. 15. By and through the use of the word "free" respondents have represented directly or through implication that the price charged by respondents is for processing alone and does not include any payment for the film.

PAR. 16. In truth and in fact, the film is not free because the continuous offer of free film over a long period of time has resulted in the price for the processing service alone becoming the regular price for the processing *and* film in combination.

Thus, the statements and representations set out in Paragraphs Fourteen and Fifteen above are false and misleading.

PAR. 17. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' merchandise because of such erroneous and mistaken belief.

PAR. 18. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Four, Five, Six and Seven hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 19. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused their said photographs, photograph albums, photograph enlargements, photograph certificates, film, baby furniture, and other merchandise to be sold in various States of the United States, and when sold, to be shipped from their place of business in the State of Florida to purchasers thereof located in various States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 20. In the course and conduct of respondents' business, respondents' agents, representatives and employees have made, directly or by implication, statements and representations to customers that contracts entered into between respondents and said customers are non-cancellable. However, such statements are false, misleading and deceptive because in truth and in fact state statutes provide customers a right to cancel.

PAR. 21. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true.

PAR. 22. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT III

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four, Five, Six and Seven hereof are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 23. In the course and conduct of their aforesaid business, respondents now cause and for some time last past have caused, letters, forms, and various other kinds and types of documents relating to the collection of delinquent accounts to be deposited in the United States mail and transmitted to persons located in the various States of the United States, all of which constitute a part of the course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 24. In the furtherance of their business and for the purpose of inducing the payment of purportedly delinquent accounts, respondents, respondents' agents, representatives, and employees have sent or caused to be sent through the mail, letters, forms, and other printed matter in which respondents make certain statements and representations to purportedly delinquent customers. Typical, but not all inclusive of said statements and representations are the following:

1.

(Letterhead)
AMALGAMATED CREDIT AND COLLECTION BUREAU
P. O. Box 781
Bronx General Post Office
Bronx, New York 10451

Dear Debtor:

Your account has been given to us by Atlantic Portrait Plan * * *. To avoid an embarrassing and expensive situation, mail your check or money order *directly* to Amalgamated Credit and Collection Bureau.

2. The above account has for value received been assigned to the credit bureau for immediate collection procedure.

3.

FINAL NOTICE

* * * You are hereby notified that we intend to institute legal action to be brought against you for the entire balance of your account.

4. If you do not see fit to take care of this small matter and honor your obligations, we will have no alternative but to collect through the Small Claims Court.

PAR. 25. By and through the use of the aforesaid statements and representations described in Paragraph Twenty-Four above and others of similar import not specifically set out herein, respondents represent and have represented directly or by implication that:

1. Delinquent accounts have been turned over or assigned for value by respondents to an independent credit and collection bureau.

2. If payments are not made, respondents will institute suit or take other legal action to collect the outstanding amount due.

PAR. 26. Such statements as those set out in Paragraphs Twenty-Four and Twenty-Five above are false and misleading because in truth and in fact:

1. Accounts have not been turned over nor assigned for value to independent credit and collection bureaus. Respondent Atlantic International Distributors, Inc., trading as Amalgamated Credit and Collection Bureau, is a corporate device used by Atlantic Industries, Inc. and the individual respondents. By use of the device respondents hope to effect the collection of delinquent accounts by representing and implying that the respondent Amalgamated Credit and Collection Bureau is an independent collection agency.

2. Respondents seldom, if ever, bring legal action to collect delinquent accounts.

PAR. 27. In the further course and conduct of the collection of delinquent accounts, respondents send or cause to be sent forms, such as the one entitled "Demand for the Payment of Debt," designed to mislead the recipient into believing that such form was sent by a government body or one of its agencies.

PAR. 28. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the payment of said delinquent accounts because of such erroneous and mistaken belief.

PAR. 29. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER AMENDING COMPLAINT

By motion filed Dec. 19, 1973, complaint counsel have requested that the complaint be amended in several respects and that certain amendments be made to the preamble to the form of order served with the complaint. Specifically, complaint counsel have requested that the following amendments be made:

(1) Amend subparagraph 2 of Paragraph Ten of Count I to read:

2. Most, if not all, prospective customers are afforded the opportunity to purchase the plan at the "special" or "reduced" price and no customer has to pay any higher price.

(2) Amend subparagraph 3 of Paragraph Ten of Count I to read:

3. The "special" or "reduced" price is not below respondents' established regular retail price of the plan. Respondents seldom, if ever, have offered or sold the plan for any price higher than the so called "special" or "reduced" price.

(3) Amend subparagraph 1 of Paragraph Eleven of Count I to read:

1. That the 100-coupon plan, which has a base selling price of $199.95 or $189.95, is valued at over $700.

(4) Add as subparagraph 7 to Paragraph Nine of Count I:

7. That the purpose of respondents' initial contact with the prospect is to give a surprise which was sent out by respondents' public relations department, or to present an advertising promotion or to make a courtesy presentation, or is for purposes other than the sale of respondents' products or services.

(5) Add as subparagraph 7 to Paragraph Ten of Count I:

7. Respondents' sales representatives have not and are not contacting persons in their homes or places of business primarily for the purpose of giving a surprise, presenting an advertising promotion or making a courtesy presentation. To the contrary, the primary purpose for contacting such persons has been and is to sell respondents' products or services.

(6) Amend the preamble to Part I of the proposed order by substituting the word "or" for the word "and" in the tenth line thereof.

(7) Amend the preamble to Part II of the proposed order by substituting the word "or" for the word "and" in the eleventh line thereof.

Respondents have filed response to complaint counsel's motion to amend the complaint wherein they do not oppose the proposed amendments numbered (1), (2), (3), (6) and (7) as set forth above. Complaint counsel have filed a reply to respondents' response, which reply has been accepted into the record and duly considered by the undersigned.

The authority of the administrative law judge to amend a complaint is set forth in Section 3.15(a)(1) of the Commission's Rules of Practice. This section of the rules provides that the administrative law judge may allow appropriate amendments to the complaint, if a determination of the controversy on the merits will be facilitated thereby; *Provided, however*, That motions for amendments may be allowed only if the amendment is "reasonably within the scope of the original complaint." Motions for other amendments to complaints shall be certified to the Commission.

The Commission has on a number of occasions interpreted this section. In *Standard Camera Corp., et al.*, 63 F.T.C. 1238, 1266 (1963), the Commission stated:

> Our Rules of Practice empower a hearing examiner to allow appropriate amendments to the pleadings. Such power is limited, however, by the caveat that the amendments must be "reasonably within the scope of the proceeding initiated by the original complaint." Where the effect of the amendment is an alteration of the underlying theory behind the complaint, or where it alleges substantially different acts or practices on the part of the respondent, or where it requires different determinations with respect to the belief that a violation has occurred and that the public interest is jeopardized, the hearing examiner is without power to authorize it. * * * Thus, where an amendment impinges upon powers exercised exclusively by the Commission, it is incumbent upon the hearing examiner to certify the matter to us for determination.

Accordingly, the requested amendments to subparagraphs 2 and 3 of Paragraph Ten and subparagraph 1 of Paragraph Eleven of Count I are hereby granted. These subparagraphs will be amended as requested by complaint counsel and as set forth hereinabove. These amendments involve a restatement of the methods employed by respondents in effectuating the practices alleged to be unlawful and are so related to the subject matter of this proceeding as to be well within the scope of the original complaint (see *Capitol Records Distributing Corporation*, 58 F.T.C. 1170, 1174 (1961)). Further, such amendments will facilitate a determination of this controversy on the merits and will not prejudice the public interest or the rights of the parties hereto.

The amendments requested to be made to the preamble of Part I and the preamble of Part II of the form of order served with the complaint are hereby denied. In the first place, the form of order served with the complaint is not a pleading as such; it does not set forth allegations of unlawful conduct. Further, it is subject to change or modificiation if record facts adduced during the proceeding make such further or other relief necessary.

Additionally, the proposed amendments to the form of order are insignificant. The conjunction "and" is construed to mean "as well as," and is a reference to "either or both." "And" is sometimes interpreted as if it were the word "or," which is an alternative, a choice of either.

Since the form of order, at least at this juncture, does not require such precision of language as does the complaint, and since the requested amendments are in reality insignificant, the proposed amendments to the preamble to Part I and the preamble to Part II of the form of order served with the complaint are denied.

The amendments requesting the *additions* of subparagraph 7 to Paragraph Nine and subparagraph 7 to Paragraph Ten fall in a different category. These proposed amendments allege substantially different acts and practices from those which are alleged in the complaint. The complaint in Paragraphs Nine and Ten is concerned with "free" gifts with the purchase of respondents' products, or "special" or "reduced" prices in connection with the sale of respondents' products. The amendments proposed by complaint counsel are new subparagraphs to be added to the complaint which challenge as unlawful respondents' initial contact with a prospective purchaser. There is no indication in the complaint, as issued, that the proposed respondents' initial contact with prospective purchasers is unlawful, or is to be challenged in this proceeding. Accordingly, complaint counsel's motion to add a subparagraph 7 to Paragraph Nine and a subparagraph 7 to Paragraph Ten will be certified to the Federal Trade Commission for a determination, since it appears that these proposed amendments, if warranted, are beyond the authority vested in the administrative law judge. Accordingly,

It is ordered, That subparagraphs 2 and 3 of Paragraph Ten and subparagraph 1 of Paragraph Eleven of Count I are amended to read as follows:

Subparagraph 2 and 3 of Paragraph Ten of Count I to read:

2. Most, if not all, prospective customers are afforded the opportunity to purchase the plan at the "special" or "reduced" price and no customer has to pay any higher price.

3. The "special" or "reduced" price is not below respondents' established regular retail price of the plan. Respondents seldom, if ever, have offered or sold the plan for any price higher than the so-called "special" or "reduced" price.

Subparagraph 1 of Paragraph Eleven of Count I to read:

1. That the 100-coupon plan, which has a base selling price of $199.95 or $189.95, is valued at over $700.

ORDER AMENDING COMPLAINT

By motion filed Dec. 19, 1973, complaint counsel moved to amend the complaint. Upon consideration of respondents' answer and complaint counsel's reply, the administrative law judge disposed of all but two of the requested amendments, concluding that they were not reasonably within the scope of the original complaint. Pursuant to Rule 3.15(a) of the Commission's Rules of Practice, the law judge certified them to the Commission on Jan. 14, 1974. The amendments in question allege misrepresentations made by respondents' sales representatives as to the purpose of their initial contacts with prospective customers.

Upon consideration of the arguments in the pleadings, and the law judge's certification, the Commission has concluded that there is reason to believe that the misrepresentations alleged in the certified amendments were made and constitute violations of Section 5 of the Federal Trade Commission Act; that it is in the public interest to try said misrepresentations together with those alleged in the original complaint rather than separately and; that any possible prejudice to respondents can be avoided through the grant of additional time. Accordingly,

It is ordered, That complaint counsel's motion to amend, as certifed to the Commission, be, and it hereby is, granted; and that the complaint be, and it hereby is, amended as follows:

Add as subparagraph 7 to Paragraph Nine of Count I:

7. That the purpose of respondents' initial contact with the prospect is to give a surprise which was sent out by respondents' Public Relations Department, or to present an advertising promotion or to make a courtesy presentation, or is for purposes other than the sale of respondents' products or services.

Add as subparagraph 7 to Paragraph Ten of Count I:

7. Respondents' sales representatives have not and are not contacting persons in their homes or places of business primarily for the purpose of giving a surprise, presenting an advertising promotion

or making a courtesy presentation. To the contrary, the primary purpose for contacting such persons has been and is to sell respondents' products or services.

It is further ordered, That the administrative law judge shall cause to be served upon respondents copies of the complaint, as amended herein, and by his order of Jan. 14, 1974.

ORDER SERVING RESPONDENTS WITH AMENDED COMPLAINT

By order of July 9, 1974, the Commission amended the complaint herein and directed that the administrative law judge cause to be served upon respondents copies of the complaint, as amended by the Commission on July 9, 1974, and as amended by the administrative law judge by order of Jan. 14, 1974. Accordingly,

It is ordered, That the complaint, as amended, be herewith served upon respondents, as per copy attached hereto.

It is further ordered, That respondents be, and they hereby are, given ten (10) days from the date of receipt of the amended complaint in which to file an answer thereto.

AMENDED COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Atlantic Industries, Inc., a corporation trading as Atlantic Portrait Plan and Atlantic Film Club, International Baby Care, Inc., Atlantic International Distributors, Inc., a corporation trading as Amalgamated Credit and Collection Bureau, National Direct Corporation, a corporation trading as National Advertised Products and International Album Plan, Jeffrey J. Weiss and Martin Osman, individually and as officers of said corporations, Lawrence Hahn, individually and as an officer of Atlantic Industries, Inc., and Richard S. Labovitz, individually and as an officer of International Baby Care, Inc. and Atlantic International Distributors, Inc., hereinafter referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Atlantic Industries, Inc., trading as Atlantic Portrait Plan, and Atlantic Film Club, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 720 N.W. 27th Ave., Miami, Fla.

Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of photographs, photograph albums, photograph enlargements, photograph certificates, film and other merchandise to the public.

Trading as Atlantic Portrait Plan, respondents' primary effort is to sell a photograph enlargement plan. Under the plan, the customer is entitled to have a specified number of enlargements developed by respondents over a ten year period. The customer pays a lump sum, often on credit, for the plan and receives a book of coupons which are redeemable for the enlargements. Said products are sold chiefly by door-to-door salesmen.

Respondent, trading as Atlantic Film Club, operates a film processing service.

PAR. 2. Respondent International Baby Care, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business at 720 N.W. 27th Ave., Miami, Fla. Respondent International Baby Care, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of baby furniture products to the public.

PAR. 3. Respondent Atlantic International Distributors, Inc., trading as Amalgamated Credit and Collection Bureau, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida. The corporate address is 720 N.W. 27th Ave., Miami, Fla. Respondent Atlantic International Distributors, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

Respondent Atlantic International Distributors, Inc. is now and for some time last past has been engaged in the collection of delinquent accounts for respondents Atlantic Industries, Inc. and International Baby Care, Inc.

PAR. 4. Respondent National Direct Corporation, trading as National Advertised Products and International Album Plan, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 720 N.W. 27th Ave., Miami, Fla. Respondent National Direct Distributors, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

Respondent is now and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of photographs, photographic albums, photograph enlargements, photograph certificates, film and other merchandise to the public.

Trading as National Advertised Products, respondents' primary effort is to sell a photograph enlargement plan. Under the plan, the customer is entitled to have a specific number of enlargements developed by respondents. The customer pays a lump sum, often on credit, for the plan and receives a book of coupons which are redeemable for the enlargements. Said products are sold chiefly by door-to-door salesmen.

Trading as International Album Plan, respondents' primary effort is to sell a photograph enlargement plan. Under the plan, the customer is entitled to have a specific number of enlargements developed by respondents. The customer pays a lump sum, often on credit, for the plan and receives a book of coupons which are redeemable for the enlargements. Said products are sold chiefly by door-to-door salesmen.

PAR. 5. Respondents Jeffrey J. Weiss and Martin Osman are officers and directors of the four corporate respondents. Said individual respondents formulate, direct, and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. The business address of the individual respondents is 720 N.W. 27th Ave., Miami, Fla.

Respondent Lawrence Hahn is a director of the four corporate respondents and an officer of respondent Atlantic Industries, Inc. In such positions, the respondent cooperates with the other individual respondents in formulating, directing, or controlling the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. The business address of respondent Hahn is 2285 Peachtree Rd., N.W., Atlanta, Ga.

PAR. 6. Respondent Richard S. Labovitz is an officer of the corporate respondents International Baby Care, Inc., and Atlantic International Distributors, Inc. and as such cooperates with the other individual respondents in formulating, directing, and controlling the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. The business address of respondent Labovitz is 720 N.W. 27th Ave., Miami, Fla.

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms, and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents and in the collection of delinquent accounts.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission

Act, the allegations of Paragraphs One, Four, Five and Seven hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 8. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused their said photographs, photograph albums, photograph enlargements, photograph certificates, film and other merchandise to be sold in various States of the United States, and when sold, to be shipped from their place of business in the State of Florida to purchasers thereof located in the various States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 9. In the course and conduct of their business and for the purpose of inducing the purchase of their merchandise, respondents, respondents' agents, representatives, and employees have made and are now making numerous statements and representations directly or by implication:

1. That customers will receive a free prize, gift, or bonus, namely a photograph album, with the purchase of the photograph enlargement plan.
2. That certain but not all prospective customers will be offered the opportunity to purchase the plan at a "special" or "reduced" price and that those prospective customers not offered the "special" or "reduced" price must pay a higher price.
3. That the "special" or "reduced" price is below respondents' established regular retail price for the plan.
4. That the "special" or "reduced" price is an "at cost" price which includes only the cost to respondents of materials needed to print and develop the enlargements.
5. That in order to purchase the plan at the "special" or "reduced" price, the prospective customer must agree to display the photograph album in his home.
6. That the special price is being offered for the purpose of advertising and promoting respondents' product.
7. That the purpose of respondents' initial contact with the prospect is to give a surprise which was sent out by respondents' public relations department, or to present an advertising promotion or to make a courtesy presentation, or is for purposes other than the sale of respondents' products or services.

PAR. 10. In truth and in fact:

1. The album is not free. Its cost is included in the cost of the plan.
2. Most, if not all, prospective customers are afforded the oppor-

tunity to purchase the plan at the "special" or "reduced" price and no customer has to pay any higher price.

3. The "special" or "reduced" price is not below respondents' established regular retail price of the plan. Respondents seldom, if ever, have offered or sold the plan for any price higher than the so-called "special" or "reduced" price.

4. The so-called "special" or "reduced" price is not an "at cost" price. The cost of the plan includes more than the cost to respondents of materials needed to print and develop the enlargements.

5. The prospective customers agreement to display the photograph album is not a prerequisite to respondents selling the plan to the customer at the so-called "special" or "reduced" price.

6. Respondents' offer is made for the purpose of realizing a profit on the sale and not for the purpose of advertising or promoting their portrait plan.

7. Respondents' sales representatives have not and are not contacting persons in their homes or places of business primarily for the purpose of giving a surprise, presenting an advertising promotion or making a courtesy presentation. To the contrary, the primary purpose for contacting such persons has been and is to sell respondents' products or services.

Therefore, the statements and representations set forth in Paragraph Nine are misleading and deceptive.

PAR. 11. In the further course and conduct of their business, respondents' agents, representatives, and employees represent directly or by implication that single enlargements are regularly sold by respondents for $7 each. Using $7 to demonstrate value, respondents further represent:

1. That the 100-coupon plan, which has a base selling price of $199.95 or $189.95, is valued at over $700.

2. That the 90-coupon plan which has a base selling price of $149.95 is valued at over $630.

3. That the 60-coupon plan which has a base selling price of $89.95 is valued at over $420.

4. That customers will save the difference between the value of the plan and the base selling price.

PAR. 12. By and through the use of the statements set out in Paragraph Eleven above, and others of similar import and meaning but not expressly set out herein, respondents have represented, and are now representing that on a regular basis for a reasonably substantial period of time in the recent regular course of their business, single enlargements have been sold for $7 and further that $7 per enlargement would be a fair and accurate amount to use in determining the value of respondents' plan.

PAR. 13. In truth and in fact respondents have not sold single enlargements for $7 or any other price on a regular basis for a reasonably substantial period of time in the recent regular course of their business. Therefore, any demonstration of value or savings based on the $7 amount such as those described in Paragraph Eleven above would be false and misleading.

In addition, when demonstrating savings to customers, respondents neglect to add to the base price of the plan an amount equal to seventy-five cents per enlargement which respondents charge to cover mailing and handling. Respondents failure to include this extra charge is deceptive and misleading because such failure results in an inflation of the amount a customer might save by purchasing the plan.

PAR. 14. In the course and conduct of respondents' operations of the film processing service and for the purpose of inducing the purchase of their developing and printing services, respondents, respondents' agents, representatives and employees have made, and are now making statements and representations to customers that customers will receive a fresh roll of Kodak film FREE with each roll of film developed or printed by respondents. The free film has been offered by respondents continuously for a period of at least two years.

PAR. 15. By and through the use of the word "free" respondents have represented directly or through implication that the price charged by respondents is for processing alone and does not include any payment for the film.

PAR. 16. In truth and in fact, the film is not free because the continuous offer of free film over a long period of time has resulted in the price for the processing service alone becoming the regular price for the processing *and* film in combination.

Thus, the statements and representations set out in Paragraphs Fourteen and Fifteen above are false and misleading.

PAR. 17. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' merchandise because of such erroneous and mistaken belief.

PAR. 18. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and

practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Four, Five, Six and Seven hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 19. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused their said photographs, photograph albums, photograph enlargements, photograph certificates, film, baby furniture, and other merchandise to be sold in various States of the United States, and when sold, to be shipped from their place of business in the State of Florida to purchasers thereof located in various States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 20. In the course and conduct of respondents' business, respondents' agents, representatives and employees have made, directly or by implication, statements and representations to customers that contracts entered into between respondents and said customers are non-cancellable. However, such statements are false, misleading and deceptive because in truth and in fact state statutes provide customers a right to cancel.

PAR. 21. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true.

PAR. 22. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT III

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four, Five, Six and Seven hereof are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 23. In the course and conduct of their aforesaid business, respondents now cause and for some time last past have caused, letters, forms, and various other kinds and types of documents relating to the collection of delinquent accounts to be deposited in the United States mail and transmitted to persons located in the various States of the United States, all of which constitute a part of the course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 24. In the furtherance of their business and for the purpose of inducing the payment of purportedly delinquent accounts, respondents, respondents' agents, representatives, and employees have sent or caused to be sent through the mail, letters, forms, and other printed matter in which respondents make certain statements and representations to purportedly delinquent customers. Typical, but not all inclusive of said statements and representations are the following:

1.

(Letterhead)
AMALGAMATED CREDIT AND COLLECTION BUREAU
P. O. Box 781
Bronx General Post Office
Bronx, New York 10451

Dear Debtor:

Your account has been given to us by Atlantic Portrait Plan * * *. To avoid an embarrassing and expensive situation, mail your check or money order *directly* to Amalgamated Credit and Collection Bureau.

2. The above account has for value received been assigned to the credit bureau for immediate collection procedure.

3.

FINAL NOTICE

* * * You are hereby notified that we intend to institute legal action to be brought against you for the entire balance of your account.

4. If you do not see fit to take care of this small matter and honor your obligations, we will have no alternative but to collect through the Small Claims Court.

PAR. 25. By and through the use of the aforesaid statements and representations described in Paragraph Twenty-Four above and others of similar import not specifically set out herein, respondents represent and have represented directly or by implication that:

1. Delinquent accounts have been turned over or assigned for value by respondents to an independent credit and collection bureau.

2. If payments are not made, respondents will institute suit or take other legal action to collect the outstanding amount due.

PAR. 26. Such statements as those set out in Paragraphs Twenty-

Four and Twenty-Five above are false and misleading because in truth and in fact:

1. Accounts have not been turned over nor assigned for value to independent credit and collection bureaus. Respondent Atlantic International Distributors, Inc., trading as Amalgamated Credit and Collection Bureau, is a corporate device used by Atlantic Industries, Inc. and the individual respondents. By use of the device respondents hope to effect the collection of delinquent accounts by representing and implying that the respondent Amalgamated Credit and Collection Bureau is an independent collection agency.

2. Respondents seldom, if ever, bring legal action to collect delinquent accounts.

PAR. 27. In the further course and conduct of the collection of delinquent accounts, respondents send or cause to be sent forms, such as the one entitled "Demand for the Payment of Debt," designed to mislead the recipient into believing that such form was sent by a government body or one of its agencies.

PAR. 28. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the payment of said delinquent accounts because of such erroneous and mistaken belief.

PAR. 29. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having hereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Atlantic Industries, Inc., trading as Atlantic Portrait Plan, and Atlantic Film Club, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 720 N.W. 27th Ave., Miami, Fla.

2. Respondent International Baby Care, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business at 720 N.W. 27th Ave., Miami, Fla. Respondent International Baby Care, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

3. Respondent Atlantic International Distributors, Inc., trading as Amalgamated Credit and Collection Bureau, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida. The corporate address is 720 N.W. 27th Ave., Miami, Fla. Respondent Atlantic International Distributors, Inc. is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

4. Respondent National Direct Corporation, trading as National Advertised Products and International Album Plan, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 720 N.W. 27th Ave., Miami, Fla. Respondent National Direct Corporation is a wholly-owned subsidiary of respondent Atlantic Industries, Inc.

5. Respondents Jeffrey J. Weiss and Martin Osman are officers and directors of the four corporate respondents. Said individual respondents formulate, direct and control the acts and practices of the corporate respondents. The business address of the individual respondents is 720 N.W. 27th Ave., Miami, Fla.

Respondent Lawrence Hahn is a director of the four corporate respondents and an officer of respondent, Atlantic Industries, Inc. In such positions, he cooperates with the other individual respondents in formulating, directing or controlling the acts and practices of the corporate respondents. The business address of respondent Hahn is 2285 Peachtree Rd., N.W., Atlanta, Ga.

6. Respondent Richard S. Labovitz is an officer of the corporate respondent International Baby Care, Inc., and as such cooperates with the other individual respondents in formulating, directing and controlling the acts and practices of the corporate respondent. The business address of respondent Labovitz is 720 N.W. 27th Ave., Miami, Fla.

7. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Atlantic Industries, Inc., a corporation trading as Atlantic Portrait Plan and Atlantic Film Club, International Baby Care, Inc., National Direct Corporation, a corporation trading as National Advertised Products and International Album Plan or under any other name, its successors and assigns and Jeffrey J. Weiss, Martin Osman and Lawrence Hahn, individually and as officers and directors of said corporations and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the advertising, offering for sale, sale or distribution of photographs, photograph albums, photograph enlargements, photograph certificates, film or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

1. Representing, orally or in writing, directly or by implication:

a. That any customer will receive a free prize, gift, or bonus with the purchase of a photograph enlargement plan or any other merchandise sold by respondents when the cost of such prize, gift or bonus is included in the price of the purchased merchandise.

b. That any offer to sell at a special or reduced price is limited to certain persons and is not available to all persons.

c. That any person not offered the special or reduced price must pay a higher price.

d. That any price of a product or service is special or reduced unless such price is below the amount at which such product or service has been sold by respondents for a reasonably substantial period of time in the recent regular course of their business.

e. That any product is sold at cost.

f. That any offer is conditioned upon specified action by the customer.

g. That the purpose of respondents' contact or solicitation is other than to sell services or products for profit.

2. Failing, clearly, emphatically and unqualifiedly to reveal, at the outset of the initial and all subsequent contacts or solicitations of purchasers or prospective purchasers, whether directly or indirectly, or by telephone, written or printed communication, or person-to-person, that the purpose of such contact or solicitation is to sell products or services as the case may be, which shall be identified with particularity at the time of each such contact or solicitation.

3. Representing, orally or in writing, directly or by implication, that any amount is respondents' usual and customary retail price for any product or service unless such amount is the price at which such product has been usually and customarily sold at retail by respondents for a reasonably substantial period of time in the recent regular course of business.

4. Representing any price as respondents' usual and customary price to demonstrate the value of a photo enlargement or any other product or service when such price is in excess of the price at which such product has been usually and customarily sold at retail by respondents for a reasonably substantial period of time in the recent regular course of business.

5. Representing, in any manner, that by purchasing any of respondents' merchandise or services, customers are afforded savings, amounting to the difference between respondents' stated price and a compared value price for comparable merchandise or service unless substantial sales of merchandise or services of like grade and quality are made in the trade area at the compared price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in the trade area in which the comparison is made which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise or services of like grade and quality.

6. Failing to disclose any charges or costs in representing savings to customers in the purchase of any product or service.

7. Misrepresenting in any manner the amount of savings available to purchasers of respondents' products or services.

8. Representing, directly or by implication, in any manner, that any price is reduced from respondents' former price or that any savings will accrue to the customer through purchase of respondents' merchandise or service unless respondents' business records establish and show that

such prices constitute a significant reduction from the price at which such merchandise has been sold in substantial quantities or openly and actively offered for sale in good faith for a reasonable substantial period of time by respondents in the recent regular course of their business.

9. Making any statements or representations to film processing customers that "free" film will be given in connection with the sale of such service, unless the price charged therefor is respondents' usual and customary price for the film processing service alone.

II

It is further ordered, That respondents Atlantic Industries, Inc., a corporation trading as Atlantic Portrait Plan and Atlantic Film Club, National Direct Corporation, a corporation trading as National Advertised Products and International Album Plan, or under any other name, International Baby Care, Inc., a corporation, the corporations' successors and assigns, and Jeffrey J. Weiss, Martin Osman, Lawrence Hahn and Richard S. Labovitz, individually and as officers or directors of said corporations and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the advertising, offering for sale, sale or distribution of photographs, photograph albums, photograph enlargements, photograph certificates, film, baby furniture or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or in any other manner, that contracts entered into between respondents and their customers are noncancellable.

2. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

> You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

3. Failing to furnish each buyer, at the time he signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned

"NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain a 10-point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

(enter date of transaction)

You may cancel this transaction, without any penalty or obligation, within three (3) business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within ten (10) business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within twenty (20) days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram to __________ *(name of seller)* at *(address of seller's place of business)* not later than midnight of __________ *(date)*

I hereby cancel this transaction.

____

(date)

____

(buyer's signature)

4. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

5. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

6. Misrepresenting in any manner the buyer's right to cancel.

7. Failing or refusing to honor any valid notice of cancellation by a buyer and within ten (10) business days after the receipt of such notice, to: (1) refund all payments made under the contract or sale; and (2) return any goods or property traded in, in substantially as good condition as when received by the seller.

8. Failing, within ten (10) business days of receipt of the buyer's

notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

Provided, however, That nothing contained in Count II of this order shall relieve respondents of any contractual obligations required by federal law or that law of the State in which the contract is negotiated. When such obligations are inconsistent, respondents may apply to the Commission for relief from this provision with respect to contract executed in the state in which such different obligations are required.

III

It is further ordered, That respondents Atlantic Industries, Inc., trading as Atlantic Portrait Plan and Atlantic Film Club, or under any other name, International Baby Care, Inc., a corporation and Atlantic International Distributors, Inc., a corporation trading as Amalgamated Credit and Collection Bureau, or under any other name, National Direct Corporation, a corporation trading as National Advertised Products and International Album Plan, or under any other name, the corporations' successors and assigns, and Jeffrey J. Weiss, Martin Osman, Lawrence Hahn and Richard S. Labovitz, individually and as officers or directors of said corporations and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the collection of delinquent accounts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, in any manner, that an account has been turned over or assigned for value to an independent credit and collection bureau.
2. Representing, orally or in writing, directly or by implication, in order to effect payment of any account, that respondents intend to institute legal action to recover for any payment due, unless respondents establish by adequate records that a prior determination had been made in good faith to institute such legal action.
3. Using the form "Demand for the Payment of Debt" or any other form which misleads or has the tendency to mislead the recipient into believing that such form was sent by a government body or one of its agencies.

IV

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents shall:

1. Provide each of their present and future branch managers, and

other supervisory personnel engaged in the sale or supervision of persons engaged in the sale of respondents' photography products or services, written instructions with respect to the provisions of this order which are applicable to the functions of each such person.

2. Require each person so described in Paragraph (1) above to clearly and fully explain the applicable provisions of this order to all sales agents, representatives and other persons engaged in the sale of the respondents' photography products or services.

3. Provide each person so described in Paragraphs (1) and (2) above with a form returnable to the respondents clearly stating his intention to be bound by and to conform his business practices to the applicable provisions of this order; retain said statement during the period said person is so engaged and make said statement available to the Commission's staff for inspection and copying upon request.

4. Inform each person described in Paragraphs (1) and (2) above that respondents shall not use any third party, or the services of any third party, if such third party will not agree to so file and does file notice with the respondents that it will be bound by the applicable provisions of this order.

5. If such third party will not agree to so file notice with respondents and be bound by the applicable provisions of the order, respondents shall not use such third party, or the services of such third party to sell respondents' photography products or services.

6. Inform the persons described in Paragraphs (1) and (2) above that respondents are obligated by this order to discontinue dealing with those persons who continue on their own the deceptive acts or practices prohibited by this order.

7. Institute a program of continuing surveillance to reveal whether the business operations of each said person described in Paragraphs (1) and (2) above conform to the applicable provisions of this order.

8. Discontinue dealing with the persons so engaged, revealed by the aforesaid program of surveillance, who continue on their own the deceptive acts or practices prohibited by the applicable provisions of this order.

9. Upon receiving information or knowledge from any source concerning two or more bona fide complaints prohibited by the applicable provisions of this order against any of their sales agents or representatives during any one-month period, will be responsible for either ending said practices or securing the termination of the employment of the offending sales agent or representatives.

10. Submit to the Commission a detailed report every six (6) months for a period of three years from the effective date of this order

demonstrating the effectiveness of the steps or actions taken with regard to the aforesaid surveillance program.

It is further ordered, That respondents herein shall notify the Commission at least thirty (30) days prior to any proposed change in the structure of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respective corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

THE NEW YOU, INC., ET AL

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2671. Complaint, June 2, 1975-Decision, June 2, 1975

Consent order requiring a Hollywood, Fla., promoter of an inherently dangerous process or treatment, involving application of a caustic chemical solution of the faces and other parts of the bodies of customers, among other things to cease misrepresenting the safety, efficacy and cost of the treatments; to clearly and conspicuously disclose the health hazards involved in the application of the process or treatment as well as the limited efficacy of the treatment; to use a licensed medical practitioner to examine, diagnose, advise, select or mentally prepare prospective patients, to supervise and direct administrations or applications of the treatment, and to provide post-operative advice or care for the patients; and to require prospective patients to consult with and obtain a certificate from an independent physician prior to treatment.

Appearances

For the Commission: *Robert L. Osteen, Jr.*

For the respondents: *Alfred E. Johnson*, Fort LauderdaleFla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that The New You, Inc., a corporation doing business as The New You, and The New You Clinic de Facial, and Robert M. Neadel, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated Sections 5 and 12 of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The New You, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at 1601 Harrison St., Hollywood, Fla.

Respondent Robert M. Neadel is an individual and an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for sometime last past have been engaged in the operation of The New You and The New You Clinic de Facial. Respondents advertise, offer for sale, and sell to the general public a medical process called The New You system (hereinafter sometimes referred to as respondents' treatment) which involves the application of a certain caustic chemical solution to the face, or various other parts of the bodies of their clients for the purported purpose of removing or diminishing manifestations of aging such as wrinkles, lines, folds and spots and undesirable features such as blemishes, large pores, and acne marks by peeling the upper layers of skin from the treated areas. After the solution is applied to the patient's skin, bandages are then applied to the treated areas and are allowed to remain for several days; after which time, the bandages are removed and the upper layers of skin, destroyed by the process, are peeled away.

PAR. 3. Respondents' medical treatment constitutes either a drug or a cosmetic, or both, as defined in Sections 15(c) and (e) of the Federal Trade Commission Act, 15 U.S.C. §§ 55(c) and (e).

PAR. 4. In the course and conduct of their business as aforesaid, respondents advertise in newspapers of general circulation which are distributed by mail in states other than the state in which they are printed. In addition, advertising materials, contracts and agreements, business correspondence, monies and other documents travel by mail between respondents' place of business and the residences of prospective patients. By virtue of these activities, respondents have maintained a substantial business in commerce, as "commerce" is used in Section 5 of the Federal Trade Commission Act. Also, respondents have disseminated and caused to be disseminated advertisements by United States mails, and in commerce by other means, within the meaning of Section 12(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 52(a)(1). Further, respondents' advertisements have the purpose of inducing, or are likely to induce, directly or indirectly, the purchase in commerce of The New You treatment, within the meaning of Section 12(a)(2) of said Act, 15 U.S.C. § 52(a)(2).

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the purchase of The New You treatment, respondents have made and are now making numerous statements and representations in advertisements inserted in newspapers of general circulation and in other promotional materials and sales presentations. Typical of the statements and representations contained in said advertising, promotional literature and during sales presentations, but not all inclusive, are the following:

> Let us take at least 15 years off your face.
>
> This is a unique regenerative process.
>
> This special youth process has brought new glow and happiness to thousands throughout the world.
>
> Now there's a new way to do something wonderful, positive, and permanent about your prematurely aged face. Now there's The New You, the dawn of a brighter day.
>
> The New You is a system of facial rejuvenation that can literally take you back 10, 15 or even 20 years in appearance.
>
> The New You is not cosmetic. It is not surgical. It is regeneration.
>
> Your next 10 days will be spent in our modern clinic, where you'll be pampered 'round the clock. During that time, the years will be painlessly disappearing from your face to be miraculously replaced by youthfully glowing new skin.
>
> We apply a special formulated solution to your skin and cover it with a mask.
>
> During the next week and a half, lines and folds around the eyes, and wrinkles on the cheeks and forehead, diminish or disappear.
>
> Give us 10 days of your time and we'll take at least 10 years off your face.
>
> And the years stay off. So if we take 15 years from your appearance, you'll continue to look about 15 years younger than you really are.
>
> Then for the next 10 days or so you simply relax at The New You facilities while the formula does its quiet work.
>
> First understand that there's no cutting, no scraping, no machines, no abrasives, no creams, no exercises.

PAR. 6. Through the use of the above statements and representations, and others of similar import and meaning but not expressly set out herein, respondents have represented directly or by implication that:

1. Respondents' treatment is not medical or surgical in nature.

2. Respondents' treatment is generally painless and involves no abrasives or caustic chemicals.

3. Potential discomfort is virtually non-existent as one can relax without emotional or physical distress during the treatment.

4. The application of the respondents' treatment is a safe procedure free from possible serious side effects or complications.

5. Respondents' treatment will eliminate or significantly diminish acne marks, big pores, deep lines, deep wrinkles and sagging or redundant folds of skin.

6. Respondents' treatment will produce or result in new, soft, fresh, clear, healthy, fine-textured skin.

7. Respondents' treatment is clinically recommended or can be beneficial to all kinds of people.

8. Respondents' personnel are competently trained and qualified to: (a) examine, advise, and mentally prepare patients to undergo the treatment; (b) determine whether each patient is a proper subject for treatment; (c) administer or perform treatment without the direction and supervision of a licensed medical practitioner; and (d) provide post-operative advice and care for patients.

9. Respondents' treatment is complete in 10 days.

10. As a result of respondents' treatment, patients will appear 15 years younger than their chronological age.

11. Respondents represent that the treatment is unique, that the process is new or special, that it involves a secret formula, that it is available only through the respondents, and that these factors justify the high price of the treatment.

PAR. 7. In truth and in fact:

1. The treatment involves application of a caustic chemical solution (containing phenol, also known as carbolic acid) to the skin, causing a second-degree burn which peels off the outer layers of the skin and produces a change in skin appearance solely by the body's own wound-healing processes. This treatment is known as chemosurgery and is a serious medical procedure.

2. The treatment involves caustic chemicals and creams which burn the upper layers of skin to create peeling and is in fact painful in many cases.

3. The pain associated with the said treatment can be so severe that respondents' patients are always sedated or anesthetized during the application of acid and may require medication for days, weeks, or months afterward to reduce pain and other discomforts, such as itching and burning. During the treatment, many patients experience such discomforts as the eyes swelling shut and difficulties breating and swallowing.

4. The treatment has a number of inherent dangers to the human body:

a. *Systemic Toxic Reaction (Poisoning).* The chemical used in The New You treatment, phenol, is toxic to kidneys, liver, and other organs of the body when present in sufficient quantities. Phenol can be absorbed through the skin during the treatment in quantities sufficient to cause serious and even fatal illness in some people. Persons with kidney infections are particularly susceptible to adverse phenol reaction.

b. *Infection.* Like any other serious burn covering a large surface of the body, the danger of infection through the burned area is ever present during the process and for some time afterward. The "powder mask," worn for a week after the initial treatment is in reality a medical step to attempt to prevent infection.

c. *The Eyes.* If the acid gets in a patient's eyes, serious permanent damage can result, including blindness; therefore, a great deal of medical skill is required and adequate precautions must be taken to prevent such an occurrence and minimize the harm if this does happen.

d. *Other Systemic Complications.* Since phenol skin peeling is a serious, traumatic medical procedure and involves use of sedatives and other medications, clients are exposed to numerous other dangers, including heart disease and allergic reactions, which accompany procedures of this type. If patients are not properly prepared, physically, mentally and emotionally, with special emphasis on full disclosure of all that the process entails, these dangers are heightened and the prospects for improvement diminished.

5. Only certain limited conditions, such as fine lines and some skin blemishes, can be affected by the process, and only in carefully selected persons. Acne scars, big pores, deep lines, deep wrinkles, and sagging or redundant folds of skin are not eliminated or significantly diminished by the treatment.

6. As a result of the treatment, a number of undesirable changes in the skin may occur, necessitating the continual use of cosmetics or medical techniques to protect the skin, or treat or camouflage its condition, including but not limited to:

a. *Scarring.* Various types of visible scars may appear after the treatment and remain indefinitely.

b. *Pigmentation Changes.* The treatment almost always produces changes in the color of the treated area, which may persist indefinitely, such as a lighter overall color, mottling (dark areas alternating with light areas), and lines of demarcation between treated and untreated areas.

c. *Redness.* The extreme redness of the skin, which occurs mainly during the healing process, may persist for a long time. Also, there may be a tendency, persisting indefinitely, for the treated skin to flush (suddenly appear red) during times of overheating, overexertion or emotional stress.

d. *Sensitivity To Sunlight.* During the healing process and for an indefinite period afterward, the treated skin may react abnormally to exposure to sunlight, including severe sunburn, mottling, and other pigmentation changes.

e. *Other Skin Reactions.* The treated skin may be affected by other problems associated with the traumatic impact of chemical skin peeling, such as increased or coarsened hair growth requiring further medical attention.

7. Favorable results cannot be achieved unless rigorous criteria for patient selection are followed, including but not limited to:

a. *Sex.* Most men should not undergo the treatment because of difficulties associated with beard growth and the necessity for wearing cosmetics to protect the skin and camouflage its condition. Yet respondents do perform the treatment on men.

b. *Age.* A young person whose skin has not matured should not go through the treatment nor should an elderly person who cannot stand the physical strain.

c. *Type Of Skin.* The treatment should only be performed on certain limited types of skin, and definitely not on dark-skinned persons because of the probability of drastic pigmentation changes.

d. *Other Factors.* People who are not in the proper physical, mental, and emotional health should not undergo this treatment.

8. Because of its serious medical nature, respondents who are not and do not employ professionally trained or licensed personnel are not qualified to deal with the complex physical, mental, and emotional factors involved in the treatment.

9. A period lasting weeks or months, the duration of which cannot be accurately predicted, is required before the skin is healed. During this time, a treated person has an extremely red face, may suffer various discomforts, and must restrict public activities, avoid direct or reflected sunlight and use heavy cosmetics to shield and camouflage the skin.

10. Treated persons cannot reasonably expect that their appearance will be altered by more than a year or two from their actual chronological age, even with the best results obtained by a professional plastic surgeon.

11. There is nothing unique about the respondents' treatment. The process is not new or secret, but is performed by qualitied plastic

surgeons under more closely controlled hospital conditions in metropolitan areas across the country for a fraction of the respondents' price.

Therefore, representations referred to in Paragraph Five are false, misleading and deceptive.

PAR. 8. In the course and conduct of their business, respondents, directly or through agents, have represented in advertisements, during oral sales presentations, and at other times and places, the asserted advantages of their treatment, as hereinbefore described. In no case have respondents disclosed:

1. The treatment is chemical skin peeling, a serious medical procedure known as chemosurgery.

2. The treatment involves the application of an acid called phenol to the skin, causing a second-degree burn which peels off the outer layers of the skin and produces a change in skin appearance solely by the body's own wound-healing reactions.

3. The pain associated with the treatment can be very severe; thus patients are sedated or anesthetized during the application of acid. This pain, as well as other discomforts, such as burning, itching, and swollen shut eyes, may persist for days or weeks afterward, requiring medication to control.

4. The treatment has a number of known inherent dangers, including: (1) poisoning of a person's entire system by the acid absorbed through the skin, which can be a serious, even fatal illness; (b) infection; (c) blindness, if the acid gets into a patient's eyes; (d) permanent scarring; and (e) other complications resulting from the traumatic nature of the procedure or the medications used.

5. A number of undesirable changes in the skin result from chemical skin-peeling, necessitating the continual use of cosmetics or medical techniques to protect, treat, or camouflage the skin. These may include: (a) permanent scarring; (b) changes in overall color of the treated area; (c) mottling; (d) a line of demarcation at the edge of the treated area; (e) extreme redness; (f) abnormal sensitivity to sunlight; and (g) other traumatic skin reactions.

6. The most common sign of aging in the neck area, which is a stringy or "turkey-neck" condition of the skin and underlying tissues, is not improved by chemical skin-peeling.

7. Almost all plastic surgeons refuse to perform chemical skin-peeling on the neck because the neck is not likely to be improved by the process and is more likely to be worsened since the risks of undesirable side effects and skin changes described above are greater.

8. Only minor aspects of skin appearance, such as fine wrinkles and some skin blemishes, can be treated by the process.

9. Acne scars, big pores, deep lines, deep wrinkles, and sagging or

redundant folds of skin are not removed or significantly reduced by the process, yet some of these conditions may be improved by other techniques of plastic surgery, such as dermabrasion or surgical face lift.

10. Most men are not advised to undergo the process because of difficulties associated with beard growth and the necessity for continual use of cosmetics.

11. A young person whose skin has not matured should not undergo the process, because of the risk of permanent skin damage.

12. Dark-skinned persons should not undergo the process because of the probability of drastic pigmentation changes.

13. Only certain kinds of people with certain types of skin have a reasonable chance of receiving favorable results and avoiding adverse effects from chemical skin peeling, and only a licensed medical practitioner familiar with such techniques of plastic surgery and able to evaluate complex physical, mental and emotional factors is qualified to examine, diagnose, advise, select, or mentally prepare patients for chemical skin peeling, and only such a professional person can provide post-operative advice and care for patients.

14. Although a treatment of this serious nature is usually performed in a hospital, respondents apply and administer the treatment at a clinic, which they own or operate.

15. It may be weeks or months after the treatment before the skin is healed, during which time a treated person has an extremely red face, may suffer various discomforts, and must restrict public activities, avoid direct or reflected sunlight and use heavy cosmetics and sun screens.

16. If a more youthful appearance is achieved through the treatment the result may not last more than a year or two, since part of the benefit is due to temporary swelling and since the natural aging processes begin all over again after the treatment.

17. Chemical skin peeling is available from qualified plastic surgeons under closely controlled hospital conditions in metropolitan areas across the country at substantially lower cost.

The disadvantages, consequences and dangers described in the above paragraph have occurred or existed, or to a reasonable medical certainty can be expected to occur or exist, and respondents knew, or had reason to know, that they could be expected to occur or exist.

Therefore, the failure to disclose the material facts referred to in Paragraph Eight is false and misleading and the acts and practices referred to in said paragraph are unfair and deceptive.

PAR. 9. In the course and conduct of their business, the respondents have been, and are now, using persons other than a licensed medical practitioner who is familiar with techniques of plastic surgery, who is operating within the limits of his or her profession, and who is qualified to evaluate complex physical, mental and emotional factors, to examine, diagnose, advise, select, or mentally prepare prospective patients for The New You treatment, to administer or apply the treatment without supervision or direction, or to provide post-operative advice or care for them.

The use by the respondents of the aforesaid practices is an unfair act or practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 10. Therefore the advertisements, representations, acts and practices referred to hereinabove are false, misleading, unfair and deceptive.

PAR. 11. The use by respondents of the aforesaid false, misleading, unfair and deceptive representations, acts and practices has the capacity and tendency to mislead consumers into the mistaken belief that said representations are true and to unfairly influence consumers, with the result that consumers are induced to undergo The New You treatment and be subjected to severe pain, discomfort, inconvenience of traveling, exorbitant charges, and risks of disease or disfigurement, without being afforded reasonable opportunity to comprehend and consider the seriousness of the treatment or to compare facial improvement treatments available from other sources under more closely controlled medical conditions, at lower prices.

PAR. 12. The respondents' acts and practices alleged herein, including the dissemination of false advertisements, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The New You, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 1601 Harrison St., Hollywood, Fla.

2. Respondent Robert M. Neadel is an individual and officer of the said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of businesss is located at the above address.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents The New You, Inc., a corporation, doing business as The New You Clinic de Facial or any other trade name or names, its successors and assigns, and Robert M. Neadel, individually and as an officer of said corporation (hereinafter sometimes referred to as "respondents"), and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or dispensing of The New You treatment (hereinafter sometimes referred to as respondents' treatment) or any similar cosmetic chemosurgical process of face lifting or skin peeling, which involves the topical application of a caustic chemical solution containing carbolic acid (also known as phenol) or other substances on the face, neck, arms, hands or other parts of the human body for the purpose of inducing superficial skin burns, the result of which is the peeling or removal of the outer layers of skin, in commerce, as "commerce" is defined in the Federal Trade Commission Act, or by the United States mails within the meaning of Section 12(a)(1) of the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing directly or by implication that:

1. Respondents' treatment or process is solely a cosmetic process, not a medical process, or does not involve chemical surgery.

2. Respondents' treatment or process is painless or involves no abrasives or caustic chemicals.

3. Potential discomfort is virtually non-existent as one can relax without emotional or physical distress during the treatment.

4. Respondents' treatment is safe or free from possible serious side effects or complications.

5. Respondents' treatment or process will remove or significantly reduce acne scars, big pores, deep lines, deep wrinkles, or sagging, redundant folds of skin.

6. Respondents' treatment will produce or result in new soft, fresh, clear, healthy, fine-textured skin.

7. Respondents' process can be clinically recommended to or safely or successfully performed on men, young people, elderly people, or dark-skinned people.

8. Respondents' personnel are competently trained and qualified to: (a) examine, advise, and mentally prepare patients to undergo the treatment; (b) determine whether each patient is a proper subject for treatment; (c) administer or perform treatment without direction and supervision of a licensed medical practitioner; and (d) provide post-operative advice and care for patients.

9. Respondents' treatment is complete within any specified period of time.

10. Respondents' treatment will cause clients to appear any specified number of years younger than their actual chronological age.

11. Respondents' process is unique, new or special in the following or other ways:

a. That it involves a secret formula or secret solution;

b. That it or similar processes are only available through respondents; and

c. That it is not available through qualified plastic surgeons under more closely controlled hospital conditions in metropolitan areas across the country at a substantially lower cost.

B. Failing or refusing to make clear and conspicuous disclosures in all advertising and in all oral sales presentations, that:

1. The treatment is chemical skin-peeling, a serious medical procedure known as chemosurgery.

2. The treatment involves the application of an acid called phenol to the skin, causing a second-degree burn which peels off the outer layers of the skin and produces a change in skin appearance solely by the body's own wound-healing reactions.

3. The pain associated with the treatment can be very severe; thus

patients are sedated or anesthetized during the application of acid. This pain, as well as other discomforts, such as burning, itching, and swollen shut eyes, may persist for days or weeks afterward, requiring medication to control.

4. The treatment has a number of known inherent dangers, including: (a) poisoning of a person's entire system by the acid absorbed through the skin, which can be a serious, even fatal illness; (b) infection; (c) blindness, if the acid gets into a patient's eyes; (d) permanent scarring; and (e) other complications resulting from the traumatic nature of the procedure or the medications used.

5. A number of undesirable changes in the skin result from chemical skin-peeling, necessitating the continual use of cosmetics or medical techniques to protect, treat, or camouflage the skin. These may include: (a) permanent scarring; (b) changes in overall color of the treated area; (c) mottling; (d) a line of demarcation at the edge of the treated area; (e) extreme redness; (f) abnormal sensitivity to sunlight; and (g) other traumatic skin reactions.

6. The most common sign of aging in the neck area, which is a stringy or "turkey-neck" condition of the skin and underlying tissues, is not improved by chemical skin-peeling.

7. Almost all plastic surgeons refuse to perform chemical skin-peeling on the neck because the neck is not likely to be improved by the process and is more likely to be worsened since the risks of undesirable side effects and skin changes described above are greater.

8. Only minor aspects of skin appearance, such as fine wrinkles and some skin blemishes, can be treated by the process.

9. Acne scars, big pores, deep lines, deep wrinkles, and sagging or redundant folds of skin are not removed or significantly reduced by the process, yet some of these conditions may be improved by other techniques of plastic surgery, such as dermabrasion or surgical face lift.

10. Most men are not advised to undergo the process because of difficulties associated with beard growth and the necessity for continual use of cosmetics.

11. A young person whose skin has not matured should not undergo the process, because of the risk of permanent skin damage.

12. Dark-skinned persons should not undergo the process because of the probability of drastic pigmentation changes.

13. Only certain kinds of people with certain types of skin have a reasonable chance of receiving favorable results and avoiding adverse effects from chemical skin-peeling, and only a licensed medical practitioner familiar with such techniques of plastic surgery and able to evaluate complex physical, mental and emotional factors is qualified to examine, diagnose, advise, select, or mentally prepare patients for

chemical skin-peeling, and only such a professional person can provide post-operative advice and care for patients.

14. Although a treatment of this serious nature is usually performed in a hospital, respondents' treatment is given at a clinic, which they own or operate.

15. It may be weeks or months after the treatment before the skin is healed, during which time a treated person has an extremely red face, may suffer various discomforts, and must restrict public activities, avoid direct or reflected sunlight and use heavy cosmetics and sun screens.

16. If a more youthful appearance is achieved through the treatment, the results may not last more than a year or two, since part of the benefit is due to temporary swelling and since the natural aging processes begin all over again after the treatment.

17. Chemical skin-peeling is available from qualified plastic surgeons under closely controlled hospital conditions in metropolitan areas across the country at substantially lower cost.

Respondents shall set forth the above disclosures separately and conspicuously from the balance of each advertisement and each presentation used in connection with the advertising, offering for sale, sale, or dispensing of respondents' cosmetic process, and shall devote no less than fifteen percent of each advertisement or presentation to such disclosures. *Provided, however*, That in advertisements which consist of less than forty-eight column inches in newspapers or periodicals, and in radio or television advertisements with a running time of two minutes or less, respondents may substitute the following statement, in lieu of the above requirements:

> WARNING: This is a medical procedure-basically a chemical burn which peels skin away. It is extremely painful, takes a long time to heal, and exposes a person to risks of poisoning, infection, permanent scarring, and other medical complications. If performed on the neck, the process may make it look worse. Many signs of aging are not improved by this process, and the benefit, if any, is mainly temporary. Only certain kinds of people can benefit from this process, and they should be diagnosed, selected, treated, and continually cared for by a qualified doctor under closely controlled medical conditions. (Statement required by order of the Federal Trade Commission.)

Respondents shall set forth the above disclosure separately and conspicuously from the balance of each advertisement, stating nothing to the contrary or in mitigation thereof, and shall devote no less than fifteen percent of each advertisement to such disclosure, and if such disclosure is made in print, it shall be in at least eleven-point type.

It is further ordered, That respondents:

1. Recall and retrieve, from each and every licensee and sales representative, all advertisements and materials upon which advertisements or oral sales presentations are based, which contain any of the

representations prohibited by Paragraph A of this order or which fail to make the disclosures required by Paragraph B.

2. Deliver a copy of this order to each present and future franchisee, licensee, and sales representative, and to each licensed medical practitioner associated with respondents or their licensees; and obtain a written acknowledgement from each of the receipt thereof.

3. Obtain from each present and future franchisee, licensee, or sales representative an agreement in writing (a) to abide by the terms of this order, and (b) to the cancellation of their license or franchise for failure to do so; and that respondents cancel the license or franchise of any licensee or franchisee that fails to abide by the terms of this order.

It is further ordered, That respondents:

1. Provide prospective and present patients, as soon as possible after initial sales contact is made with such person and before such person signs any document relating to respondents' process, an information sheet which shall be furnished to the prospective patient and which contains nothing but the disclosures, numbered 1 to 17, set forth in Paragraph B. Respondents shall allow these persons ample, uninterrupted opportunity to read and consider the contents of this information sheet. Respondents shall retain a copy of this information sheet, after it is signed and dated by the person, for a period of two (2) years.

2. Require that each such prospective patient, after receipt of the information sheet described above and before he or she signs any contract for respondents' treatment, consult with a licensed physician, who is not in any way associated with or recommended by the respondents, regarding the nature of chemical skin-peeling, its dangers, discomforts, limitations, and alternatives. Respondents shall obtain from each prospective patient a certificate, signed by the physician who was thus consulted, specifying that the physician:

a. Understands what respondents' treatment is and the conditions under which it will be performed;

b. Has explained to the prospective patient the nature of the treatment, its dangers, discomforts, limitations, and alternatives;

c. Has conducted or has examined the results of tests appropriate to determine prospective patient's physical fitness to undergo respondents' treatment and has discussed these results with the prospective patient; and

d. Has reviewed appropriate aspects of the prospective patient's medical history and has discussed these aspects with the prospective patient.

This certificate shall specify the date and approximate time of the consultation, and respondent shall retain all such certificates for three (3) years.

It is further ordered, That no contract for respondents' process shall become binding on the patient prior to forty-eight hours after the patient has consulted with the physician who will direct and supervise the performing of the treatment and inspected and approved the treatment and recuperation facilities, and that:

1. Respondents shall clearly and conspicuously disclose, orally prior to the time of sale, and in writing on any contract, promissory note or other instrument signed by the patient, that the purchaser may rescind or cancel any obligation incurred, with return of all monies paid, by mailing or delivering a notice of cancellation to the respondents' place of business prior to the end of this period.

2. Respondents shall provide a separate and clearly understandable form which the purchaser may use as a notice of cancellation.

3. Respondents shall return to such patient, within forty-eight hours after receipt of notice of cancellation, all monies paid.

4. Respondents shall not negotiate any contract, promissory note, or other instrument of indebtedness to a finance company or other third party prior to the time the patient is treated.

It is further ordered, That respondents cease and desist from the following unfair practice:

1. Failing or refusing to use a licensed medical practitioner, who is familiary with such techniques of plastic surgery, who is operating within the limits of his or her profession, and who is qualified to evaluate complex physical, mental and emotional factors, to examine, diagnose, advise, select, or mentally prepare all prospective patients for chemical skin-peeling, to supervise and direct all administrations or applications of the treatment, and to provide post-operative advice or care for all such patients.

It is further ordered, That respondents maintain at all times in the future, for a period of not less than three (3) years, complete business records relative to the manner and form of their continuing compliance with the above terms and provisions of this order.

It is further ordered, That the corporate respondent notify the Commission at least thirty (30) days prior to any proposed change in said respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, licensees, or franchisees, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment, and of his affiliation with a new business or employment, in the event of such discontinuance or affiliation. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ZENITH LABORATORIES, INC., ET AL.

Docket 8426. Order, June 3, 1975

Show cause order of July 24, 1973, proposing modification of the order to cease and desist vacated.

Appearances

For the Commission: *J. Thomas Rosch.*

For the respondents: *David R. Simon, Simon & Allen*, Newark, N.J.

ORDER VACATING ORDER PROPOSING MODIFICATION OF ORDER TO CEASE AND DESIST

On Apr. 13, 1973, respondent Zenith Laboratories, Inc. (Zenith), petitioned the Commission to reopen the consent order, dated Mar. 30, 1962, for the purpose of modifying said order by setting aside the order in its entirety. The 1962 consent order requires respondent to cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement:

(a) Uses the terms "quality control" or "exacting controls," or any other words or terms of similar import or meaning; or

(b) Represents, directly or indirectly:

(1) That respondents have an adequate control system, or misrepresents the nature or extent of the procedures used by them in the manufacture, preparation or distribution of drugs or food.

The Commission concluded that good cause had been shown for modifying the above provisions of the order, but not as respondent requested, and so, by order of July 24, 1973, reopened this proceeding and ordered respondent Zenith to show cause why the order should not be modified by requiring respondent Zenith to cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement:

(a) Uses the terms "quality control" or "exacting controls," or any other words or terms of similar import or meaning; unless respondents also state in the same advertisement that such controls are required of all drug manufacturers pursuant to the standards set by the Federal Food, Drug, and Cosmetic Act, as amended; *Provided, however,* That such controls are in fact in conformance with the standards set by the Federal Food, Drug, and Cosmetic Act, as amended.

(b) Represents, directly or indirectly:

(1) That respondents have a more exacting quality control system than prescribed by the Federal Food, Drug, and Cosmetic Act, as amended, or misrepresents the nature or extent of the procedures used by them in the manufacture, preparation or distribution of drugs or food.

Paragraph 1(a)

Zenith, in its answer dated Aug. 24, 1973, requested that the Commission modify the consent order to permit it to use the terms "quality control" and "exacting controls" in its advertisements, without the proposed qualifying language (*i.e.*, "that such controls are required of all drug manufacturers pursuant to the standards set by the Federal Food, Drug and Cosmetic Act, as amended"). The grounds of Zenith's objections were that (1) the qualifying language could be read to imply that FDA approved of the company's quality controls, when a FDA regulation specifically prohibits a party from advertising that it has a new drug application approved by FDA; (2) it would be impractical for Zenith to include such wording; and (3) no other company is required to make the subject disclosure.

The Food and Drug Administration, by letter dated Nov. 16, 1973, similarly recommended against requiring the qualifying language, as "it appears * * * that this would be inequitable unless it were enforced against all manufacturers," and, in addition, might give rise to the "possible implications that the Food and Drug Administration has approved the company's quality control standards when, in fact, that is not the situation."

Counsel supporting the complaint concur in these recommendations that the 1962 order not be modified as proposed by Paragraph 1(a). We agree.

Paragraph 1(b)(1)

No objection to this modification was made by either FDA or respondents. We agree, however, with counsel supporting the complaint that the subject modification should be rejected. Representations as to "quality control" or "exacting controls" (representations which would be permissible under the modification) "should be permitted," counsel supporting the complaint point out, "[only] when respondent's controls significantly exceed the minimum requirements of the law * * *." It is our opinion that many consumers tend to believe that firms in their manufacturing processes comply with the standards set by law, and, as a consequence, the use of such terms as "quality control" may well create the impression that the standards employed by the manufacturer exceeds those set by law. It follows, then, that since the subject provision is intended to prohibit representations that quality controls exceed those prescribed by FDA, representations as to "quality controls" or "exacting controls" should be proscribed. Accordingly,

It is ordered, That the Commission's show cause order of July 24, 1973 proposing modification of the order to cease and desist issued in this matter on Mar. 30, 1962, be, and it hereby is, vacated.

IN THE MATTER OF

GIFFORD-HILL & COMPANY, INC.

Docket 8989. Order, June 3, 1975

Denial of complaint counsel's motion requesting the Commission seek an all writs injunction.

Appearances

For the Commission: *Paul N. Kane*, *Laurence Masson*, *Paul Breitstein* and *Lawrence Punter*.

For the respondent: *John H. Schafer*, *Covington & Burling*, Wash., D.C. and *Merlyn D. Sampels*, *Worsham, Forsythe & Sampels*, Dallas, Tex.

ORDER DENYING REQUEST TO SEEK INJUNCTION

This matter is before the Commission on the certification by the administrative law judge of complaint counsel's motion entitled "Request for Action Pursuant to the All Writs Act." In an *in camera* affidavit accompanying his "Request," counsel supporting the complaint affirms that it is his belief that one of the three ready-mix concrete concerns acquired by respondent, the acquisition of which is challenged in the complaint in the above-captioned matter, is the subject of an agreement of sale to named individuals. Respondent's counsel oppose the certification, alleging that there is no threat that the subject ready-mix concrete firm will be "annihilated" by its acquirer, and that "instead, the enterprise involved will emerge from its prospective transaction as a healthy independent enterprise * * *." Respondent concludes that, therefore, "this case bears no resemblance whatsoever to the threatened anticompetitive schemes that have prompted the Commission to seek All Writs Act injunctions in the past." By letter dated May 19, 1975, respondent's counsel sets forth, as an additional reason for denying the request, the fact that the contract of sale had been "fully consummated."

We agree that complaint counsel's request should be denied. The divestiture of the ready-mix firm makes moot the request for an injunction against Gifford-Hill. This is not to say, however, that the divestiture has mooted that part of the complaint challenging the acquisition of the divested ready-mix firm by Gifford-Hill as a violation of Section 7 of the Clayton Act. Should the acquisition be found to violate Section 7, the Commission is not precluded from requiring Gifford-Hill to recreate a viable firm comparable in competitive strength to the divested firm should the record demonstrate the need for such relief.

In addition, it should be noted that if it is shown that the divested firm will be dismantled, an All Writs injunction, or an injunction pursuant to Section 13(b) of the Federal Trade Commission Act, as amended by the 1973 Alaska Oil Pipeline Act, might be appropriate, but as against the present owners of the subject ready-mix firm, not Gifford-Hill. Such facts have not been alleged here. Accordingly,

It is ordered, That counsel supporting the complaint's request that the Commission seek an All Writs injunction be, and hereby is, denied.

Commissioner Thompson not participating.

IN THE MATTER OF

INTERSTATE INVESTORS CORPORATION, ET AL.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 9008. Complaint, Jan. 28, 1975-Final Order, June 3, 1975

Order dismissing the complaint issued against a Virginia Beach, Va., loan broker for alleged violation of the Truth in Lending Act, on the basis that the individual

respondent is now deceased and the corporate respondent has ceased business operations and has no remaining assets.

Appearances

For the Commission: *Bernard Rowitz, Alice C. Kelleher* and *Thomas J. Keary.*

For the respondents: *Lewis, Sacks & DeLaura,* Norfolk, Va.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Interstate Investors Corporation, a corporation, and Bernard A. Salzberg, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Interstate Investors Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its principal office and place of business located at Suite 224, 287 Independence Blvd., Virginia Beach, Va.

Respondent Bernard A. Salzberg, is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged as brokers in the arranging and securing of loans for the general public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of business as aforesaid, respondents' customers are provided with consumer credit cost disclosure statements.

By and through the use of the aforesaid consumer credit cost disclosures respondents:

1. Fail to include the broker's fee or finder's fee in the determination of the finance charge, as required by Section 226.4(a)(3) of Regulation Z.

2. Fail to disclose the broker's fee or finder's fee as a prepaid finance charge, as required by Section 226.8(e)(1) of Regulation Z, using the term "prepaid finance charge," as required by Section 226.8(d)(2) of Regulation Z.

3. Fail to itemize the components of the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

4. Fail to disclose accurately the annual percentage rate computed in accordance with Section 226.5(b) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

5. Fail to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

6. Fail to disclose clearly the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.6(a) of Regulation Z.

7. Fail to identify the broker as a creditor, as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

8. Fail to make full consumer credit cost disclosures before the transaction is consummated, as required by Section 226.8(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of the Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

MARCH 24, 1975

The complaint herein issued on Jan. 28, 1975, and was mailed on Mar. 3, 1975. Respondents are charged in the complaint with failing to comply with certain provisions of Regulation Z (12 C.F.R. §226) promulgated pursuant to the Truth in Lending Act (15 U.S.C. 1601, *et seq.*), and thereby with a violation of the Federal Trade Commission Act (15 U.S.C. §41, *et seq.*).

Complaint counsel were thereafter informed, by way of a letter and a subsequent affidavit from an attorney familiar with respondents, that individual respondent Bernard A. Salzberg was recently deceased and that the corporate respondent went out of business in October 1974 and has no assets. Complaint counsel have accordingly filed a motion to dismiss this proceeding as to all respondents since, based on the above facts, there appears to be no public interest in continuing this proceeding.

Section 3.22(e) of the Rules of Practice provides that an initial decision shall be filed when a motion to dismiss is granted. Since it appears appropriate to grant complaint counsel's motion to dismiss, the following findings of fact and conclusions are hereby made:

FINDINGS OF FACT

1. The complaint in this matter issued on Jan. 28, 1975 charging Interstate Investors Corporation, a corporation, and Bernard A. Salzberg, individually and as an officer of said corporation, with violations of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Failure to comply with said Regulation Z is alleged to be a violation of the Federal Trade Commission Act (Complaint, Pars. One-Five).

2. The complaint alleges that respondent Bernard A. Salzberg is an officer of the corporate respondent, and he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint. His address is the same as that of the corporate respondent (Complaint, Par. One).

3. Bernard A. Salzberg died on Jan. 23, 1975 in Virginia Beach, Va. He was the owner of all the stock of the corporate respondent, Interstate Investors Corporation (Affidavit of Albert S. Lewis, dated Mar. 13, 1975).

4. Respondent Interstate Investors Corporation went out of business during October 1974, and has been inoperative ever since. The corporate respondent has no assets (Affidavit of Albert S. Lewis, dated Mar. 13, 1975).

CONCLUSIONS

Since individual respondent Bernard A. Salzberg, the sole owner of corporate respondent Interstate Investors Corporation, is now deceased, and the corporate respondent has ceased business operations and has no remaining assets, it is concluded that there is no public interest in continuing this proceeding.

ORDER

It is hereby ordered, That the complaint in this matter be, and it hereby is, dismissed as to all respondents.

FINAL ORDER

No appeal from the initial decision of the administrative law judge having been filed and the Commission having determined that the case should not be placed on its own docket for review, pursuant to Section 3.53 of the Commission's Rules of Practice;

It is ordered, That the initial decision and order of the administrative law judge be, and they hereby are, adopted as the decision and final order of the Commission.

IN THE MATTER OF

MILTON BRADLEY COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8926. Complaint, April 13, 1973–Decision, June 5, 1975

Consent order requiring a Springfield, Mass., manufacturer of toy, craft and hobby products, among other things to cease packaging its products in oversized containers creating the impression that purchasers are receiving a larger product or greater quantities; and providing others with the means to deceive the purchasing public.

Appearances

For the Commission: *Herbert S. Forsmith, Alan F. Rubinstein* and *Armando Labrada.*

For the respondent: *Charles V. Ryan and William G. White,* Springfield, Mass.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Milton Bradley Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Milton Bradley Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts with its principal office and place of business located at 443 Shaker Road, East Longmeadow, Mass.

PAR. 2. Respondent now, and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of toy, gift and hobby products to jobbers and retailers for resale to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, said products, when sold, to be shipped from its place of business in the State of Massachusetts to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among the products which are offered for sale and sold by the respondent are a number of toy, gift and hobby products offered under the names "Crafts by Whiting" and "Lisbeth Whiting." Through the use of certain methods of packaging, respondent has represented and has placed in the hands of others the means and instrumentalities through which they might represent, directly or indirectly, that certain of the above products, as depicted or otherwise described on the exteriors of packages, corresponded, in their lengths and widths and thicknesses, with the packages in which they were contained, and that others of such products were offered in quantities reasonably related to the size of the packages in which they were presented for sale.

PAR. 5. In truth and in fact, such products often have not corresponded with their package dimensions and are often not offered in quantities reasonably related to the size of packages in which they are presented for sale. Purchasers of such a product are thereby given the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact.

Therefore, the methods of packaging referred to in Paragraph Four hereof were and are unfair and false, misleading and deceptive.

PAR. 6. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as the products sold by the respondent.

PAR. 7. The use by respondent of the aforesaid unfair, false, misleading and deceptive methods of packaging has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the quantum or amount of the product being sold was and is greater than the true such quantum or amount, and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of the respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with a copy of that complaint, together with a proposed form of order; and

The Commission having duly determined upon motion certified to the Commission, that, in the circumstances presented, the public interest would be served by waiver of the provisions of Section 2.34(d) of its rules which provides that the consent order procedure shall not be available after issuance of complaint; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Milton Bradley Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its offices and principal place of business located at 1500 Main Street, Springfield, Mass.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Milton Bradley Company, a corporation, and its officers, and respondent's agents, representatives, employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of hobby products, toy craft products and activity toys such as those which have been manufactured or distributed by the Crafts by Whiting division of Milton Bradley Company, and any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Packaging said products in oversized boxes or other containers so as to create the appearance or impression that the width or thickness or other dimensions or quantity of products contained in a box or container is appreciably greater than is the fact; but nothing in this order shall be construed as forbidding respondent to use oversized containers if respondent justifies the use of such containers as necessary for the efficient packaging of the products contained therein and establishes that respondent has made all reasonable efforts to prevent any misleading appearance or impression from being created by such containers;

2. Providing wholesalers, retailers or other distributors of said products with any means or instrumentality with which to deceive the purchasing public in the manner described in Paragraph (1) above.

It is further ordered, That respondent or its successors or assigns notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporate respondent which may affect compliance obligations arising out of this order.

It is further ordered, That the respondent distribute a copy of the order to all operating divisions and subsidiaries of said corporation, and also distribute a copy of this order to all firms and individuals involved in the formulation or implementation of respondent's business policies, and all firms and individuals engaged in the advertising, marketing, or sale of respondent's products.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

LIBRARY MARKETING SERVICE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2673. Complaint, June 6, 1975–Decision, June 6, 1975.

Consent order requiring an Orlando, Fla., seller of magazine subscriptions and other publications through the use of "mail-in" or "two-payment" purchase plans, among other things to cease using deceptive means to sell magazine subscriptions to the public and to recruit sales agents.

Appearances

For the Commission: *Lawrence L. Langer.*

For the respondents; *Jon D. Rosenberg & Marvin E. Newman,* Orlando, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Library Marketing Service, Inc., a corporation, and W. Michael Nace, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Library Marketing Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at LMS Building, 1320 44th Street, Orlando, Fla.

Respondent W. Michael Nace is the president of the corporate respondent. As such, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are engaged in the sale of magazine subscriptions and other publications to the purchasing public by a method which is commonly referred to as the "two-payment" or "mail-in" purchase plan.

Respondents enter into business arrangements with certain publishers or distributors of magazines and other publications whereby the publishers or distributors agree to accept and fill orders for designated magazines or other publications sold by respondents. The publishers or distributors generally require that the magazines or other publications be sold for a designated amount and that respondents forward an agreed upon amount to the publisher or distributor thereof.

Pursuant to such arrangements, the respondents solicit and sell to the purchasing public subscriptions to such magazines or other publications.

PAR. 3. In the course and conduct of their business of selling magazine subscriptions pursuant to subscription contracts, as aforesaid, respondents have entered into contractual arrangements with publishers or distributors of magazines whereby respondents are authorized to sell certain magazine subscriptions at designated selling prices and to pay designated amounts to said publishers or distributors as payment for said subscriptions. Respondents are thereby given authority to sell subscriptions to some but not all magazines and other publications.

PAR. 4. In the course and conduct of their business, as aforesaid, respondents enter, and have entered, into agreements with individuals known as "crew managers" who in turn employ or hire "sale agents," "solicitors," or other representatives to sell said magazines or other publications.

Acting through their said crew managers and solicitors, respondents place into operation and, through various direct and indirect means and devices, control, direct, supervise, recommend and otherwise implement sale methods whereby members of the general public are contacted by door-to-door solicitations, and by means of statements, representations, acts and practices as hereinafter set forth, are induced to sign subscription contracts with respondents which provide for the purchase of magazines or other publications and payment thereof usually on a subscription order with the appropriate publishers and distributors for magazines and other publications respondents are authorized to sell.

In the manner aforesaid, respondents, directly or indirectly, through said crew managers control, furnish the means, instrumentalities, services and facilities for, condone, approve and accept the pecuniary benefits flowing from the acts, practices and policies hereinafter set forth, of said crew managers and sales solicitors, hereinafter collectively referred to as respondents' representatives or solicitors.

PAR. 5. In the course and conduct of their business and in the manner aforesaid, respondents through their representatives or solicitors, who travel from one area to another, solicit subscriptions for magazines and other publications in various States of the United States. Respondents transmit and receive in commerce various printed materials used in the solicitation and sale of magazine subscriptions and other publications. Said respondents or solicitors cause subscription contracts and money to be sent from various states to respondents' place of business in Florida by instructing members of the purchasing public to so mail in their orders. These contracts are then forwarded by respondents to various publishers or distributors, many of whom are located in states other than the State of Florida. Respondents thereby maintain, and at all times mentioned herein have maintained, a substantial course of trade in the sale of magazine subscriptions in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Respondents and respondents' crew managers in the course and conduct of their business as aforesaid, have disseminated, and now disseminate or cause to be disseminated, classified advertisements in newspapers of general and interstate circulation and in newspapers throughout the United States and have made statements and representations respecting pay and working conditions, designed and intended to induce individuals to apply as representatives or solicitors to sell magazine subscriptions on the behalf of respondents.

Among and typical of such statements and representations, but not all inclusive thereof, are the following:

1. Visit major cities and resort areas with transportation furnished and return guaranteed.

2. Above average salary plus compnay bonus after training * * *$520 monthly to start* * *

3. * * *immediate cash draw * * *expenses and transportation provided* * *

4. New car transportation furnished* * *

In the aforesaid manner, the respondents have represented, and are now representing directly or by implication, that:

1. Persons who answer respondents' advertisements and who become representatives or solicitors for respondents will travel on a planned itinerary exclusively to major cities and resort areas and that return free transportation is guaranteed at any time.

2. Persons who answer respondents' advertisements and who become representatives or solicitors for respondents will earn a salary, as for example, $520 monthly.

3. Respondents will pay the expenses of persons who answer respondents' advertisements and who become representatives or solicitors for respondents.

4. Persons who answer respondents' advertisements and who

become representatives or solicitors for respondents will be furnished a new car while traveling for or on the behalf of respondents.

PAR. 7. In truth and in fact:

1. Persons who answer respondents' advertisements and who become representatives or solicitors for respondents do not travel on a planned itinerary exclusively to major cities and/or resort areas with an unconditional guaranteed return.

2. Persons who answer respondents' advertisements and who become representatives or solicitors for respondents do not earn a salary but are commissioned sales agents.

3. Respondents do not pay expenses of persons who answer respondents' advertisements and who become representatives or solicitors for respondents.

4. Persons who answer respondents' advertisements and who become representatives or solicitors are not furnished new cars while traveling for or on behalf of respondents.

Therefore, the statements and representations as set forth in Paragraph Six hereof, were, and are, false, misleading and deceptive.

PAR. 8. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their magazine subscriptions, respondents and respondents' representatives or solicitors have represented, and now represent, directly or by implication, that:

1. Respondents are authorized to sell subscriptions for and are able to deliver or cause the delivery of all magazines for which they sell subscriptions and accept payments.

2. Respondents' representatives or solicitors are participants in a "contest" working for prizes and awards and are not solicitors working for money compensation.

3. Respondents' representatives or solicitors are employed by or affiliated with programs designed to provide assistance to underprivileged or disadvantaged groups or persons, including but not limited to, racial and religious minorities.

4. Respondents' representatives or solicitors are competing for college scholarship awards.

5. Respondents' representatives or solicitors are college sutdents working their way through school.

6. Respondents' representatives or solicitors are nursing school students competing for nursing school scholarships or awards.

7. Magazines purchased by subscribers will be distributed to various hospitals as gifts or contributions.

8. Respondents' representatives or solicitors are foreign exchange students or otherwise foreigners whose ability to remain in this country is related to the sale of magazine subscriptions.

9. Respondents' representatives or solicitors are veterans of the armed forces whose magazine sales will benefit other vetarans or veterans organizations.

PAR. 9. In truth and in fact:

1. Respondents are not authorized to sell subscriptions for and are not able to deliver or to cause the delivery of all magazines for which their representatives or solicitors sell subscriptions and accept payments. In certain instances, respondents' representatives or solicitors sell subscriptions for magazines which respondents are not authorized by the publisher or distributor thereof to sell, and consequently, respondents are unable to deliver or to cause the delivery of these magazines for which they have accepted payments from subscribers.

2. Respondents' representatives or solicitors work for money compensation and are not primarily participants in a "contest" working for prizes and awards; such contest awards are designed to motivate sales efforts and increased earnings. The excessive use by respondents and their representatives or solicitors of credentials, oral representations and promotional materials, identifying such representatives or solicitors as participants in a contest constitutes a spurious tactic designed to enable their representatives or solicitors to utilize a personal sympathy appeal in the sale of subscriptions.

3. Respondents' representatives or solicitors are not employed by or affiliated with programs designed to provide assistance to underprivileged or disadvantaged groups or persons. The use by respondents' representatives or solicitors of such representations is likewise a spurious device to gain personal sympathy in the sale of subscriptions.

4. Respondents' representatives or solicitors are not competing for college scholarship awards but are merely commissioned sales agents.

5. In a substantial number of instances, respondents' representatives or solicitors are not college students working their way through college, but are merely commissioned sales agents.

6. Respondents' representatives or solicitors are not competing for nursing school scholarships or awards but are merely commissioned sales agents.

7. Magazines purchased by subscribers are not distributed to various hospitals as gifts or contributions.

8. In a substantial number of instances, respondents' representatives or solicitors are not foreign exchange students nor are those solicitors able to remain in this country only by continuing activities related to magazine sales.

9. Respondents' representatives or solicitors are not employed for the benefit of veterans or any veterans association but are merely

commissioned sales agents. Moreover, references to their status as veterans are, in many instances, a spurious device for appealing to a prospective purchaser's personal sympathy or patriotism.

Therefore, the aforesaid acts and practices were, and are, unfair practices and are false, misleading and deceptive.

PAR. 10. In the further course and conduct of their business as aforesaid, where respondents have received payment for subscriptions to magazines they are in fact authorized to sell and are able to deliver or cause to be delivered, they have, in many instances, failed to deliver or cause to be delivered such magazines within a reasonable period of time.

Therefore, the aforesaid acts and practices were, and are, unfair practices and are false, misleading and deceptive.

PAR. 11. In addition to the foregoing statements, representations, acts and practices, respondents have engaged in door-to-door solicitations of the aforesaid subscriptions, either without prior invitation to solicit such sales from prospective purchasers or by using one or more of the deceptive means and methods aforesaid to gain access to prospective purchasers at times and under circumstances when such prospective purchasers were not otherwise considering the purchase of magazines or other publications, and without either:

1. affirmatively stating and affording such purchasers the right to cancel any resulting subscription contracts for a period of not less than three (3) business days following such solicitations; or

2. by refusing to honor any such right purportedly given either orally or in writing, or thwarting the exercise of any right so given.

The solicitation of subscription sales without permitting cancellation within a reasonable period of time constitutes an unfair, false, misleading and deceptive practice where such sale includes two payments on the part of the subscriber and where it is made under the conditions and circumstances herein alleged.

PAR. 12. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of magazine subscriptions.

PAR. 13. By and through the use of the aforesaid acts and practices, respondents place in the hands of the crew managers, sales agents, representatives and others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 14. The use by respondents of the aforesaid false, misleading, deceptive and unfair representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of a substantial number of magazine subscriptions from respondents.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in § 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Library Marketing Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at LMS Building, 1320 44th Street, Orlando, Fla.

Respondent W. Michael Nace, is the president of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Library Marketing Service, Inc., a corporation, its successors and assigns, and W. Michael Nace, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of magazines, magazine subscriptions or any other publication, merchandise or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Respresenting, directly or by implication, to prospective representatives or solicitors that they will travel on a planned itinerary exclusively to large cities and resort areas throughout the United States and foreign countries; or misrepresenting, in any manner, the travel opportunities available to their representatives or solicitors.

2. Representing, directly or by implication, to prospective representatives or solicitors that they will earn or receive $520 per month or any other stated or gross amount; or representing, in any manner, the past earnings of respondents' representatives or solicitors, unless in fact the past earnings represented have actually been received by a substantial number of respondents' representatives or solicitors and accurately reflect the average earnings of such representatives or solicitors, or misrepresenting in any manner, the terms, conditions, or nature of such employment, or the manner or amount of payment for such employment.

3. Representing, directly or by implication, to prospective representatives or solicitors, that respondents will pay all, or any part of, the expenses of such solicitors except during a limited training period, or misrepresenting in any manner the terms or conditions of employment as a representative or solicitor for respondents.

4. Soliciting or accepting subscriptions for magazines or other publications which respondents have no authority to sell or which respondents cannot promptly deliver or cause to be delivered.

5. Representing, directly or by implication, that respondents' representatives or solicitors are participants in a contest working for prize awards and are not solicitors working for money compensation; or misrepresenting, in any manner, the status of their sales agents or representatives or the manner or amount of compensation they receive.

6. Representing, directly or by implication, that respondents'

representatives or solicitors are employed by or affiliated with programs designed to provide assistance or promote the welfare of underprivileged or disadvantaged groups or persons.

7. Representing, directly or by implication, that respondents' representatives or solicitors are competing for college scholarship awards.

8. Representing, directly or by implication, that respondents' representatives or solicitors are college students working their way through school, unless such is the fact.

9. Representing, directly or by implication, that respondents' sales agents or representatives are competing for nursing school or trade school awards or scholarships.

10. Representing, directly or by implication, that magazines, books or other publications purchased by subscribers will be distributed to various hospitals, veterans associations, schools and institutions as gifts or contributions.

11. Representing, directly or by implication, that respondents' representatives or solicitors are veterans; unless such is the fact; or representing, directly or by implication that the sale of magazines, books or other publications is or will be beneficial to veterans or veterans organizations.

12. Utilizing any sympathy appeal to induce the purchase of subscriptions, including but not limited to: illness, disease, handicap, race, financial need, eligibility for benefits offered by respondents, or other personal status of the solicitor, past, present or future; or representing that earnings from subscription sales will benefit certain groups of persons such as students or the underprivileged, or will help charitable or civic groups, organizations or institutions.

13. Failing clearly and conspicuously without any qualification, orally and in writing, to reveal at the initial contact or solicitation of a purchaser or prospective purchaser, whether directly or indirectly, or by written or printed communications, or person-to-person, that the purpose of such contact or solicitation is to sell products or services as the case may be, which shall be identified with particularity at the time of such contact or solicitation.

14. Failing within thirty (30) days from the date of the receipt of the final payment to enter subscriptions for each magazine, book or other publication with publishers which respondents are authorized by the publisher or distributor thereof to sell.

15. Misrepresenting the number and name(s) of publications being subscribed for, the number of issues and duration of each subscription and the total price for each and all such publications.

16. Failing to give clear and conspicuous oral and written notice to

each subscriber that upon written request said subscriber will be entitled to a refund of all monies paid if he does not have his order cleared to the publisher within 30 days of the entry of the final payment.

17. Failing to refund all monies to subscribers who have not had their orders to magazines, books or other publications, subscribed for through respondents entered within 30 days from the date of the final payment thereof or to offer the subscribers the right to substitute one or more publications or the extension of the subscription period for a publication already selected, at the option of the subscribers, upon written request by such subscribers.

18. Failing to furnish to each subscriber at the time of sale of any subscription a duplicate original of the contract, order or receipt form showing the date signed by the customer and the name of the sales representative or solicitor together with the name and mailing address of the marketing broker or crew manager together with the respondents' corporate name and address showing on the same side of the page the exact number and name(s) of the publications being subscribed for, the number of issues and duration of each subscription and the total price for each and all such publications.

19. Furnishing, or otherwise placing in the hands of others, the means or instrumentalities by or through which the public may be misled or deceived in the manner or as to the things prohibited by this order.

It is further ordered, That respondents do forthwith cease and desist from:

1. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the respondent, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

> You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

2. Failing to furnish each buyer, at the time he signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the respondents, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in 10

point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract

NOTICE OF CANCELLATION

(enter date of transaction)

____

(date)

You may cancel this transaction, without any penalty or obligation, within three (3) business days from the above date.

If you cancel, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within ten (10) business days following receipt by the seller of your cancellation notice, and the transaction will be canceled.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram to

____

(name of seller)

at ______________ ______________

(address of seller's place business)

not later than midnight of ______________ ______________

(date)

I hereby cancel this transaction.

____

(date)

____

(buyer's signature)

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents shall:

1. Provide each of their present and future crew managers, and other supervisory personnel engaged in the sale or supervision of persons engaged in the sale of respondents' products or services, written instructions with respect to the provisions of this order which are applicable to the functions of each such person.

2. Require each person so described in Paragraph 1 above to clearly and fully explain the applicable provisions of this order to all sales agents, representatives and other persons engaged in the sale of the respondents' products or services.

3. Provide each person so described in Paragraph 1 above with a form returnable to the respondents clearly stating his intention to be bound by and to conform his business practices to the applicable provisions of this order; retain said statement during the period said person is so engaged and make said statement available to the Commission's staff for inspection and copying upon request.

4. Inform each person described in Paragraph 1 above that respondents shall not use any third party, or the services of any third

party, if such third party will not agree to so file and does file notice with the respondents that he or she will be bound by the applicable provisions of this order.

5. If such third party will not agree to so file notice with respondents and be bound by the applicable provisions of the order, respondents shall discontinue utilizing the services of or accepting orders from such third party.

6. Inform the persons described in Paragraph 1 above that respondents are obligated by this order to discontinue dealing with those persons who continue on their own the deceptive acts or practices prohibited by this order.

7. Institute a program of continuing surveillance to reveal whether the business operations of each said person described in Paragraph 1 above conform to the applicable provisions of this order.

8. Discontinue dealing with the persons so engaged, revealed by the aforesaid program of surveillance, who continue on their own the deceptive acts or practices prohibited by the applicable provisions of this order.

9. Upon receiving information or knowledge from any source concerning two or more bona fide complaints prohibited by the applicable provisions of this order against any marketing broker, sales agents or representatives during any one-month period, forthwith be responsible for either ending said practices or securing the termination of the employment of the offending sales agents or representatives.

10. Submit to the Commission a detailed report every six (6) months for a period of three (3) years from the effective date of this order demonstrating the effectiveness of the steps or actions taken with regard to the aforesaid surveillance program.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include a reference to respondents' new business or employment and a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the

Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

In the Matter of

ASH GROVE CEMENT COMPANY

Docket 8785. Order, June 10, 1975

Denial of respondent's motions to stay a final decision in this matter, reopen the record for the reception of evidence, or dismiss the complaint.

Appearances

For the Commission: *Thomas F. McNerney, Paul N. Kane* and *Nancy P. Rosenfeld.*

For the respondent: *David McKean* and *Robert Williams, McKean, Whitehead & Wilson,* Wash., D.C.

ORDER DENYING RESPONDENT'S MOTION TO STAY A FINAL DECISION IN THIS MATTER, REOPEN THE RECORD FOR THE RECEPTION OF EVIDENCE, OR DISMISS THE COMPLAINT.

By Motions filed Feb. 10, 1975 and Apr. 3, 1975, respondent in the above-captioned matter requests: (a) a stay of any final order, other than a dismissal of the complaint, pending the judicial outcome of the first of respondent's two separate attempts to obtain Commission documents under the Freedom of Information Act, 5 U.S.C. §551, *et seq.;* (b) a reopening of the adjudicative record until such time as respondent obtains, and offers into evidence, documents sought under both of its Freedom of Information Act requests; or, in the alternative (c) a final order dismissing the complaint.

The first and second request each seek essentially the same relief. Each would have the Commission hold in abeyance any final order in this matter until after the resolution of respondent's pending attempts to obtain documentation. Such documentation as might be forthcoming, it is urged, could be probative with respect to certain affirmative defenses raised in the course of this adjudication. The request for dismissal is grounded on the argument that because the Commission recently elected to close an investigation of certain acquisitions allegedly similar to those of respondent, it would be an abuse of discretion to continue the current case against respondent.

With respect to the request for dismissal, it is the Commission's view that it is well within its discretion to continue this proceeding, despite having elected to close the investigation referenced in respondent's motion papers. *See Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967). As to the requests for stay of a final order and subsequent reopening of the record, the Commission finds that the respondent had ample opportunity for discovery in this matter. The ALJ determined that the documents now requested pursuant to the Freedom of Information Act, 5 U.S.C. §551, *et seq.*, were not subject to discovery in the adjudicative proceeding. The Commission finds that arguments predicated upon the receipt and attempted introduction of these same documents into evidence are too speculative and uncertain a base upon which to stay this proceeding. Accordingly,

It is ordered, That respondent's motions filed Feb. 10, 1975 and Apr. 3, 1975, be, and they hereby are, denied.

IN THE MATTER OF

TYSONS CORNER REGIONAL SHOPPING CENTER, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8886. Complaint, May 8, 1972 Decision, June 10, 1975***

Consent order requiring a New York City department store chain, among other things to cease entering into or enforcing leases which exclude competitors, fix retail prices, eliminate discount selling, and otherwise restrain trade.

Appearances

For the Commission: *Anthony Low Joseph, David I. Wilson,* and *Maynard F. Thompson.*

For the respondents: *H. Max Ammerman,* Wash., D.C., *Weil, Gotshal & Manges,* New York, N.Y., *Rosenman, Colin, Kaye, Petshek, Freund & Emil,* New York, N.Y., *Hogan & Hartson,* Wash., D.C., *Surrey, Karasik & Morse,* Wash., D.C.

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* Complaint reported in 83 F.T.C. 1598.

** Reported as corrected by order of July 29, 1975.

INITIAL DECISION BY ADMINISTRATIVE LAW JUDGE MORTON NEEDELMAN

OCTOBER 30, 1974

I

STATEMENT OF THE CASE

The complaint in this proceeding was issued on May 8, 1972. It charges that the partnership which developed the Tysons Corner Regional Shopping Center (hereinafter Tysons Corner Center) and the three major department store tenants of the center (City Stores Company, The May Department Stores Company and Woodward and Lothrop, Inc.) had individually, and in combination with each other, caused the inclusion or enforcement of certain lease provisions which unfairly suppress competition in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45). Most notably, the complaint was directed at lease provisions which give the department stores the right to disapprove the other tenants to whom the developer could rent space.

What began as a three-count complaint against four respondents has been reduced by prehearing orders[1] and consent settlements,[2] to a one-count case (Count II of the complaint) against one respondent-City Stores Company, hereinafter "City Stores."

Count II alleges that City Stores, acting alone, has "caused the inclusion or enforcement of lease provisions which suppress, restrict, hinder, lessen, prevent and foreclose competition in the resale and distribution at retail of goods and services in the Tysons Corner trading area." Specifically, the complaint charges that the challenged provisions give City Stores the power (a) to disapprove other tenant leases, (b) to limit the floor space available to other tenants, and (c) to exercise continuing control over the conduct of other business operations.[3] The complaint alleges that these provisions have the tendency to restrain trade by (a) fixing prices, (b) allowing City Stores to choose their competitors and to exclude actual and potential competititors, (c) eliminating discount advertising and discount selling, (d) denying the public the benefit of price competition, (e) boycotting potential entrants, and (f) restricting the developer in his choice of potential tenants.

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[1] Without objection of complaint counsel, City Stores' motion to dismiss Count I as to City Stores (alleging conspiracy by the three department stores and the developer to include and enforce an "approval clause") was granted by Administrative Law Judge von Brand on Feb. 21, 1973. At the same time, City Stores' motion to dismiss Count II was denied. Later, Administrative Law Judge von Brand denied respondent's Motion for Summary Judgment on Count II and complaint counsel's cross-motion for partial summary decision (Order of Sept. 17, 1973). Count III of the complaint was directed solely to the partnership which developed Tysons Corner.

[2] On June 26, 1974, the Commission accepted a consent settlement from the developer (Tysons Corner Regional Shopping Center, a partnership), The May Department Stores Company, and Woodward and Lothrop, Inc. disposing of all charges against these respondents 3 CCH Trade Reg. Rep., ¶20,532 [83 F.T.C. 1598].

[3] By stipulation of complaint counsel, the complaint allegation respecting the power to require tenants to join an approved "merchant association" (Complaint, Para. 13(c)) was removed from the case (Tr. 368).

City Stores filed an answer on June 14, 1972, which admits certain facts about the corporate identity and size of respondent as well as the nature of its management, purchasing, and delivery practices in the Washington, D.C. metropolitan area. City Stores also admits that its lease with Tysons Corner gave it certain rights and privileges but it denies that the existence of these rights violates Section 5 of the Federal Trade Commission Act. All other material allegations in the complaint were denied. Moreover, City Stores offered as an affirmative defense the argument that City Stores had not caused the inclusion of the questioned lease provisions, but instead that they were entered into pursuant to an order of the United States District Court for the District of Columbia, and that City Stores has neither attempted to enforce nor actually enforced any of the questioned lease provisions.[4]

When the undersigned was assigned to this proceeding as administrative law judge on June 3, 1974.[5] the parties had been working for some time on a lengthy factual stipulation. The stipulation was completed and received in evidence on July 16, 1974.[6] The parties submitted the case for decision on the understanding that the entire record was to consist of the stipulation, complaint, answer, previous rulings of the Commission in the case and the orders of administrative law judges who were assigned to hear the matter, as well as any evidence which might be presented between July 16, 1974, and the time the record was officially closed.[7] No witnesses were called by either party, no other evidence was offered, and the record was closed on Aug. 1, 1974.

Thereafter, proposed findings and briefs were submitted by both parties. These papers were considered by the undersigned, and all proposed findings which are not herein adopted either in the form or substance proposed are rejected as not supported by the evidence or as involving immaterial matters.

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[4] Another affirmative defense was directed at alleged procedural irregularities when the complaint issued; namely, improper participation and possible conflict of interest by the former director of the Bureau of Competition in violation of Section 0.735-10 of the Commission's Rules. This defense was pressed in ancillary litigation which was decided eventually against respondent's favor.

[5] Judge von Brand resigned from the Office of Administrative Law Judges on Nov. 10, 1973, and he was replaced by Administrative Law Judge Donald R. Moore who was relieved of the assignment on June 2, 1974.

[6] The stipulation is designated as JX (*i.e.*, Joint Exhibit) 1A through 1 Z-17. The attachments to the stipulation are JX 1 Z-18 (site plan for Tysons Corner Center); JX 1 Z-19 *in camera* (sales of Tysons Corner Center) and JX 1 Z-20 to 1 Z-207 (City Stores - Tysons Corner lease).

[7] The record was left open for two weeks in order for the parties to consider alternative methods of producing evidence on certain issues and to weigh the undersigned's admonition that it might be desirable to have documentary or live testimony on the issue of business justification for the subject practices (Tr. 468-488, 530-532).

After having reviewed the record of this proceeding as stipulated by the parties, as well as proposed findings and supporting briefs filed by the parties, I find that this proceeding is in the public interest, and, based on the entire record I make the following findings of fact.

II

FINDINGS OF FACT

CITY STORES AND ITS LANSBURGH'S DIVISION

1. Respondent City Stores Company ("City Stores") is a Delaware corporation, with its principal office and place of business at 500 Fifth Ave., New York, N.Y. Through its various divisions and subsidiaries, City Stores owns and operates 38 department stores (more than 10 of which are in regional shopping centers), 68 specialty stores, and 43 home furnishing stores. These 149 retail outlets are located in 18 States and the District of Columbia. In fiscal 1974, ending Jan. 31, 1974, sales by City Stores exceeded $373 million (Stip. ¶1; JX 1-B).

2. From its headquarters in New York City, respondent controls the overall activities, including the shopping center activities of its various divisions and subsidiaries (Stip. ¶1; JX 1-B).

3. Until June 19, 1973, one of the divisions owned and operated by City Stores was the Lansburgh's department store chain in the Wash., D.C. metropolitan area.[8] By February 1972, Lansburgh's, whose principal place of business was at 204 Seventh St., N.W., Wash., D.C., operated five department stores in Metropolitan Washington - one in downtown Washington, two in Maryland, and two in Virginia. One of the Virginia department stores was located in Tysons Corner Center (Stip. ¶¶2, 3; JX 1-B to 1-C).

4. While the total sales of the Lansburgh's chain were in excess of $28 million in 1973, this represented only 1.4 percent of sales of general merchandise, apparel and furniture in the Wash., D.C. area. Moreover, the rate of growth of Lansburgh's sales between 1964 and 1973 was substantially below the rate at which department store sales generally increased in the Wash., D.C. area (Stip. ¶4; JX 1-C to 1-D).

5. In January 1973, City Stores decided to terminate the operations of its Lansburgh's stores in the Wash., D.C. area and liquidate the Lansburgh's division. As a result, since June 1973, the Lansburgh's stores in the Wash., D.C. area, including the store in Tysons Corner Center, have been closed; the Lansburgh's division has been liquidated; and City Stores operates no department stores in Metropolitan

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[8] The Wash., D.C. metroplitan area consists of Wash., D.C., Montgomery and Prince Georges Counties, Maryland, and Alexandria, Fairfax, and Falls Church cities, and Arlington, Fairfax, Loudoun and Prince William Counties, Va. (Stip. ¶5; JX 1-D).

Washington under Lansburgh's or any other name (Stip. ¶26; JX 1-W to 1-X).

6. Lansburgh's was, prior to and during the term of its tenancy at Tysons Corner Center, in competition with the Hecht division of The May Company, and Woodward and Lothrop, as well as other retail establishments engaged in the sale of merchandise lines similar to merchandise sold by Lansburgh's (Stip. ¶26; JX 1-W).

7. In the course and conduct of its business at Tysons Corner Center during the period 1969 to 1973, Lansburgh's engaged in the purchase, delivery and mailing of goods across State lines. It also advertised its goods and offered them for sale in newspapers circulated across state lines in Metropolitan Washington. While most of Lansburgh's customers at Tysons Corner Center were residents of the Commonwealth of Virginia, and most goods sold by Lansburgh's at Tysons Corner Center were sold to residents of Virginia, customers from the District of Columbia and Maryland shopped at Tysons Corner Center and either carried the merchandise they purchased across State lines or had the goods delivered across state lines (Answer ¶6; Stip. ¶25; JX 1-V to 1-W).

The Development and Importance of Tysons Corner Center

8. Tysons Corner Center, in which Lansburgh's operated a department store between 1969 and 1973, was developed and is managed by a partnership whose principals include Theodore N. Lerner and H. Max Ammerman. The main office of the partnership is located in Wheaton, Md. (Stip. ¶9; JX 1-G).

9. Financed by the Connecticut General Life Insurance Company of Bloomfield, Conn., Tysons Corner Center was constructed during the period 1966 to 1968. It is located in Fairfax, Va., approximately nine miles northwest of downtown Wash., D.C. on a triangular shapped 90-acre parcel of land adjoining the D.C. beltway. It opened for business on July 25, 1968 (Stip. ¶¶10, 12; JX 1-G, 1-H to 1-I). The general layout of the center, which had been formulated and completed by December 1965 without the participation or prior approval of City Stores, anticipated a gross leasable area of over a million square feet which included the planned construction of three department stores occupying 150,000 square feet each (Stip. ¶11; JX 1-H).

10. With over 1.2 million square feet of leasable floor space, Tysons Corner Center is one of the nation's largest regional shopping centers (Stip. ¶11; JX 1-H). In size, it ranks among the top 196 shopping centers

out of a total of over 15,000 shopping centers of various sizes in the United States (Stip. ¶8; JX 1-F to 1-G).[9]

11. As a regional shopping center, Tysons Corner Center provides a variety and depth of goods and services comparable to an urban central business district (Stip. ¶7; JX 1-E). At one time or another, there have been as many as three major department stores and 111 "satellite" outlets located in the center. And like an urban business district, Tysons Corner Center includes more than just retail outlets-it has several 30-story office towers, theatres, motels (Appendix 1-A to Stipulation; JX 1-Z-18), banks, art galleries, health clubs and restaurants (Stip. ¶30; JX 1-Z-3 to 1-Z-6). Sales of the center are very substantial (JX 1-Z-19, *in camera*).

12. Regional shopping centers, such as Tysons Corner Center, represent a significant segment of retailing in the United States, accounting for between 13 percent and 20 percent of all retail sales (Stip. ¶¶7, 8; JX 1-D to 1-G).

13. The Tysons Corner Center presently has two major tenants, a Woodward and Lothrop department store and a Hecht's department store, each of approximately 150,000 square feet. As indicated in Finding 5, Lansburgh's no longer operates a store in the center.

14. City Stores is seeking to assign its lease to Arlen Realty and Development Company, which intends to operate a Korvette store in the former Lansburgh's space. The Tysons Corner Center management opposes the assignment and the issue is being litigated in the Virginia State courts. The former Lansburgh's space covering 156,277 square feet is now vacant (Stip. ¶27; JX 1-X).

15. In addition to securing major tenants (*i.e.*, City Stores, The May Company and Woodward and Lothrop) the Tysons Corner Center developers have negotiated with and entered into a number of satellite tenant leases for retail selling space at the Center. The signing of satellite tentants began in mid-1967, and continued after City Stores entered the Center. A satellite tenant of a shopping center is a tenant other than a major or "anchor" tenant - *i.e.*, in the case of Tysons

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[9] As used in this proceeding, a "shopping center" is defined as a planned development of retail outlets managed as a unit in relation to a trade area which the development is intended to serve, and providing on-site parking in some definite relationship to the types and sizes of stores in the development (Stip. ¶6; JX 1-D). There are various kinds of shopping centers, to wit:

A "regional shopping center" which has at least one major tenant. Typically, this major tenant has 100,000 square feet or more of selling space. This major tenant serves as an "anchor" and provides the regional shopping center with its primary drawing power. A "satellite tenant" in a regional shopping center is any tenant of a shopping center which is not an anchor or major tenant. The minimum gross lease space (GLA) of a regional shopping center ranges between 200,000 (generally for older centers) and 400,000 square feet. The median GLA space of a regional shopping center is 519,000 square feet with a middle range from 361,000 to 776,000 square feet. In addition to regional shopping centers, there are smaller shopping centers called "community shopping centers" (with a median GLA of 160,000 square feet, a middle range GLA from 122,000 to 204,000 square feet, and a junior department store or variety store as principal tenant), and neighborhood shopping centers (with a median GLA of 49,000 square feet, a middle range GLA from 36,000 to 70,000 square feet and a supermarket as the principal tenant) (Stip. ¶7; JX 1-D to 1-F).

Corner Center other than the three department stores (Stip. ¶7; JX 1-E).

16. The Tysons Corner Center developers met with prospective satellite tenants and negotiated with them in Maryland, Virginia, the District of Columbia and, in a few instances, in other States. Some of the satellite tenants are organized and have their principal place of business outside of the Commonwealth of Virginia. The Tysons Corner Center developers make use of the United States mails in the negotiation and execution of satellite tenant leases (Stip. ¶30; JX 1-Z-3).

17. Retail merchandise sold at the Tysons Corner Center by major and satellite tenants is often manufactured, stored, and shipped in or from States other than Virginia. In some cases, retail tenants of Tysons Corner Center will deliver or mail goods purchased at the center to customers outside of the Commonwealth of Virginia. While some customers of Tysons Corner Center are residents of Maryland and the District of Columbia, most of the goods sold at the Tysons Corner Center are bought by residents of Virginia (Stip. ¶31; JX 1-Z-7).

The Approval Clause

18. As indicated in Finding 7, City Stores, through its Lansburgh's division, began doing business in Tysons Corner Center in 1969. By the terms of its entry into Tysons Corner Center, City Stores obtained a lease substantially identical to the leases of The May Company and Woodward and Lothrop, the other major department stores in Tysons Corner Center. (Findings 41 to 50).

19. The City Stores-Tysons Corner Center lease contained a provision giving respondent the right to disapprove the entry of new satellite tenants. This power to control effectively the entry of new competitors is contained in Section 31.3 of the lease. Section 31.3, as obtained by City Stores, and as previously contained in The May Company and the Woodward and Lothrop leases, provides:

> *Section 31.3* With respect to all Center Leases, (including any modifications of, supplements to or renewals of (other than renewals made in accordance with renewal provisions in effect as of the date hereof in Center Leases in effect as of the date hereof) entered into by Landlord for the occupancy of Floor Area on the Shopping Center Site (exclusive of the Tenant Store), the following provisions shall apply:
>
> (A) No Center lease shall be entered into with any person(s) in respect of the Mall Stores (or any part or parts thereof or any storeroom or storerooms therein) located within one hundred twenty-five (125) feet of the Enclosed Mall facades of the Tenant Principal Building, unless Tenant shall have previously approved the identity and location of the Person(s) as proposed Occupant(s), which approval, as respects identity, shall be granted or withheld in the sole and absolute judgment of Tenant and which approval, as respects location, shall not be unreasonably withheld (provided, however, that by the

execution of this Lease, Tenant approves the identity of the Person(s) enumerated in Part I of Exhibit M hereof).

(B) As respects any building, buildings and/or improvements or any part or parts thereof or any storeroom or storerooms therein located more than one hundred twenty-five (125) feet from the Enclosed Mall facades(s) of the Tenant Principal Building, all Center Leases entered into for the occupancy of thirty thousand (30,000) square feet or less of Floor Area shall be subject to the previous approval of Tenant of the identity of the Person(s), which approval shall not be unreasonably withheld, provided, however, that by the execution of this Lease Tenant approves the identity of the Person(s) enumerated in Part I of Exhibit M hereof.

(C) Landlord agrees that in respect of the selection and location of Occupants on the Shopping Center Site, the following objectives, *inter alia*, shall be considered (provided, however, nothing contained in this sentence shall be deemed to derogate from the rights, privileges, powers and immunities of Tenant under this Article XXXI); (a) having financially sound Person(s) of good reputation as Occupant(s) of the Shopping Center Site, (b) maintaining a balanced and diversified grouping of retail stores, (c) establishing and maintaining a proper mixture of retail stores and a diversified selection of merchandise, and (d) avoiding excessive and persistent traffic congestion in the Common Area.

(D) No Center Lease shall be entered with any Person(s) providing for the occupancy of more than thirty thousand (30,000) square feet of Floor Area without the prior consent of Tenant, which consent may be granted or withheld in the sole and absolute discretion of Tenant. Notwithstanding the provisions of the preceding sentence, Landlord may enter into a Center Lease (i) for the operation of a retail facility (1) in the Woodward store at the location shown on Exhibit B hereof, * * * subject, however, to the prior approval of Tenant of the identity of the proposed Occupant thereunder (which approval shall be granted or withheld in the sole and absolute judgment of Tenant), provided, however, by execution of this Lease Tenant approves the identity of the Person(s) (as proposed Occupants) as enumerated in Part II of Exhibit M hereof, and (2) in the May Store location shown on Exhibit B hereof, * * * subject, however, to the prior approval of Tenant of the identity of the proposed Occupant thereunder (which approval shall be granted or withheld in the sole and absolute judgement of Tenant), provided, however, by execution of this Lease Tenant approves the identity of the Person(s) (as proposed Occupants), as enumerated in Part II of Exhibit M hereof. (ii) (subject to the provisions of Sec. 31.3(A)), with the respective proposed Occupants listed in Part I of Exhibit M for occupancy of Floor Area (in excess of 30,000 sq. ft.) in the respective sizes set forth in Part I of Exhibit M; and

(E) Except with respect to the Woodward Store and the May Store, the Center Lease(s), including any modifications of, supplements to or renewals thereof, shall contain provisions: (1) prohibiting any Person(s) (including, but not by way of limitation, assignees, transferrees, subleassees, licensees or mortgagees of or through any Occupant (whether by voluntary or involuntary act or by operation of law) or any holder of a corporate Occupant's possessory interest by dissolution, merger, consolidation or by transfer of more than fifty percent (50%) of the issued and outstanding voting stock of such corporate Occupant), unless the occupancy of such Person(s) is previously approved in accordance with the provisions of this Sec. 31.3, from occupying Floor Area on the Shopping Center Site, (2) subject to the provisions of Sec. 35.3(E) hereof, requiring the Occupant to join the merchants' association referred to in Article XXXV hereof and to comply with the rules and regulations thereof and to contribute at least pro rata to the annual budget thereof on the basis of the ratio of its respective Floor Area to the aggregate Floor Area on the Shopping Center Site, (3) requiring the Occupant with respect to its facilities, to comply with the standards of maintenance management,

> operation and control set forth in Exhibit L hereof, (4) requiring the Occupant to comply with the provisions of Article XXXVI hereof, and (5) providing that the provisions of this subsection (E) shall be enforceable by the parties hereto, jointly or severally.
>
> (F) The Foregoing provisions of this 31.3 as respects the approval of the identity of Person(s) set forth in Part I of Exhibit M hereof and as respects the approval of the amount of Floor Area that may be occupied by respective Person(s) set forth in Part I of Exhibit M hereof are subject to the conditions, qualifications, limitations and restrictions provided with respect thereto in Part I of Exhibit M hereof.

The references to "Tenant" in the above-quoted lease provisions refer to City Stores (Stip. ¶28; JX 1-X to 1-Z-2).

20. Exhibit M, which is referred to in Section 31.3 of the lease, are lists of Tysons Corner Tenants whose admission the Center was deemed approved by City Stores (Stip. ¶29; JX 1-Z-2). While Exhibit M contains a varied and extensive list of merchants, it does not include the recognized discounters in the Wash., D.C. area - *i.e.*, Dalmo, Sun Radio and George's. City Stores did not participate in any negotiations concerning the merchants included in, or excluded from Exhibit M (Stip. ¶29; JX 1-Z-2 to 1-Z-3). Of the 111 tenants now located at Tysons Corner Center, about one-half were not pre-approved by inclusion in Exhibit M (Compare JX 1-Z-4 with JX 1-Z-192 to 1-Z-200).

21. As part of the approval process contemplated by Section 31.3 of the lease, the Tysons Corner Center developers sent a letter dated Feb. 21, 1969, which requested City Stores' approval of a lease for Dalmo Sales Company ("Dalmo"). At that time, Dalmo, which is a well-known Washington area discounter, had five retail outlets in the Washington Metropolitan Area, including stores in Maryland, Virginia and the District of Columbia. The letter stated:

> In accordance with the provisions of your Lease, we hereby request your approval of the Lease executed by us with Tyco Appliances and TV, Inc. for location D-7, as shown and outlined in red on the enclosed Leasing Plan. Tyco will sell appliances and is owned and operated by Dalmo. The lease contains provisions which prohibit both Tyco and Dalmo from advertising discount or bargain sales at all of their present stores. In fact, Dalmo is now in the process of removing their "discount slogan" from all advertising, signing, etc. (Stip. ¶42; JX 1-Z-14)

22. City Stores did not reply to the Tysons Corner Partnership letter of Feb. 21, 1969. Approval of Dalmo was given pursuant to Section 31.5(B) of City Stores lease, which provides:

> The failure of Tenant to disapprove the location and/or identity or Person(s) as proposed Occupant(s) under Center Lease(s) within seven (7) days after request for respective approval thereof by Landlord shall be deemed to constitute the approval thereof. (Stip. ¶43; JX 1-Z-15)

23. Although City Stores approved Dalmo's lease (Stip. ¶43; JX 1-Z-15), Dalmo never became a tenant in Tysons Corner Center because The May Company and Woodward and Lothrop, which also had the right to dsapprove a prospective entrant, vetoed the Dalmo entry (Stip. ¶44; JX 1-Z-15).

24. Also pursuant to Section 31.3 of the lease, on Apr. 29, 1969, City Stores was asked to and did give its approval to the lease of Sun Radio Stores, another well-known Washington decorator. At that time, Sun Radio had nine retail outlets in the Washington Metropolitan Area, including stores in Maryland and Virginia. An addendum to the Sun Radio lease provides:

> Tenant covenants and agrees that with reference to all of the Sun Radio Stores in the Washington-Metropolitan area, it shall not include in any of its advertising or other material in its stores, any advertising or reference to the effect that it continually sells or offers merchandise for sale at bargain prices. Tenant further agrees that it shall not use the word "discount" or make any reference to a discount operation in any such advertising or on any signs at Tysons Corner Center or other material. Tenant may, however, advertise sales from time to time, as are incidental to any ordinary retail business. Tenant will remove the word "discount" from any of its signs at any other location when present sign is replaced with a new sign. (Stip. ¶45; JX 1-Z-15 to 1-Z-16)

25. Apart from the facts cited in Findings 18 to 24, 32, 34 and 41 to 51 relating to the acquisition and enforcement of approval rights in the City Stores-Tysons Corner Center lease, there is no evidence showing any direct action by City Stores to eliminate price competition from new entrants. Thus, respondent had not requested nor had it discussed or suggested the Dalmo "no-discounter" provision with either the developer, Dalmo (Stip. ¶42; JX 1-Z-14), or the other major tenants. (Stip. ¶43; JX 1-Z-15) Respondent was not present during the negotiation and drafting of the addendum to the Sun lease, nor did it state to the developer or to anyone else that its approval of the Sun lease would be conditioned on the inclusion of the no-discounter provision (Stip. ¶45; JX 1-Z-16).

26. While City Stores officials claim that they would have approved both the Dalmo and Sun entry without the no-discounter clauses (stip. ¶¶43, 45; JX 1-Z-15, 1-Z-16), in fact, when approval was actually given, there was no indication of such willingness since (1) approval to the Dalmo entry was accomplished by not responding at all to the approval solicitation which included the no-discounter provision (Stip. ¶43; JX 1-Z-15), and (2) approval of the Sun entry was apparently given to the very lease which included the no-discounter clause (Stip. ¶45; JX 1-Z-15 to 1-Z-16).

Satellite Lease Provisions

27. Once approval is given by the major tenants, including City Stores, satellite tenants are allowed to enter Tysons Corner Center and operate under a standard form lease. The standard satellite lease was formulated and completed prior to the execution of the City Stores lease (Stip. ¶32; JX 1-Z-7), and City Stores did not participate in the drafting or negotiation of the standard form lease (Stip. ¶38; JX 1-Z-

12), nor did it discuss with or suggest to Tysons Corner Center, The May Company, or Woodward and Lothrop the inclusion or exclusion of any provision in the standard form lease (Stip. ¶39; JX 1-Z-12).

28. While the standard satellite lease may be modified and tailored to the requirements of each leasing transaction, most satellite tenants operate under a standard lease containing a ban against operating a discount store similar to a "Korvette" which sell merchandise at discount or bargain prices. Thus, Article 16.I of the Tysons Corner Center printed satellite tenant lease form, which respondent knew about at least since 1969 (Stip. ¶41; JX 1-Z-13) provides as follows:

> Tenant shall not operate or conduct in the demised premises a type of businees currently known in the commercial trade as a "discount store" or a "bargain store" similar to a "Korvette" or other type of discount store, nor shall Tenant operate or conduct a business continuously selling, or offering or purporting or holding itself out to sell, merchandise or services at "discount" or "bargain" prices. Tenant shall not, unless otherwise expressly permitted so to do hereunder, use or permit the use of trading stamps* * *. Notwithstanding any other provision hereof, any substantial addition to or change in the type, or price lines, or quality of merchandise or services, or any substantial other change in the type of business permitted to be carried on by Tenant hereunder, without the express prior written consent of Landlord (which consent may be granted or withheld in Landlord's sole and absolute discretion, and with or without statement of or necessity for reason therefor, and which, if granted, may be conditioned, among other things, upon Tenant's agreement to comply with new and additional requirements not set forth or contained in this lease which may be applicable to all or any part of the demised premises without regard to the prior or prospective use thereof, and including but not limited to requirement of payment of an increased or additional rent over the rent prescribed herein) may be deemed to be a breach and violation of this lease at Landlord's sole and absolute discretion. (Stip. ¶36; JX 1-Z-8 to 1-Z-9)

29. There are satellite tenant leases which contain changes in the printed form of Article 16.I. For example, the Giant lease permits the use of trading stamps. Article 16.I is modified from the printed form in the following leases as indicated:

(1) *Bailey, Banks & Biddle:* The last sentence is amended to provide that the Landlord's consent may not be unreasonably withheld.

(2) *Fabric Tree:* The last sentence is deleted.

(3) *Giant:* The last sentence is deleted.

(4) *Joseph R. Harris:* The last sentence is amended to prohibit the stated additions or changes "unless such addition or change is in accordance with the policy in effect in a majority of the stores being operated by Tenant in the Metropolitan Washington Area."

(5) *Olan Mills:* Addendum (12) to the lease provides:

> The offering of a "loss leader" or a similar discount or bargain price shall not be deemed to be a violation of the provisions of Article Sixteen, Paragraph I, providing Tenant does not persistently use the specific words "discount" and/or "bargain" in its advertising and telephone solicitations.

(6) *Peoples Drug:* Addendum (37) contains a new clause in lieu of and based upon Article 16.I which provides that Peoples shall not conduct a

discount operation unless a majority of Tenant's stores in the Wash., D.C., Metroplitan Area do so. In addition, a proviso is added to the end of Article 16.I as follows:

> provided, however, that nothing herein contained shall be deemed to limit or prohibit Tenant from adding to or changing the brands or specific lines of merchandise, or changing the brands or specific identifications or types or price lines or quality of merchandise dealt in or dispensed on the premises, so long as the general pattern and type of operation as a drug store, as permitted and described on page 1 of this Lease, shall continue to be maintained.

(7) *Singer:* The last sentence of Article 16.I is deleted.

(8) *Spencer Gifts:* Article 16.I is deleted in its entirety.

(9) *Thom McAns:* The beginning of the last sentence of Article 16.I is changed to read:

> Notwithstanding any other provision hereof, any substantial change in the price lines, or any change in the type of business permitted to be carried on * * *

(10) *Top Value:* This tenant's lease is not the printed form, and it contains no provision identical or similar to Article 16.I.

(11) *United Virginia Bank:* Article 16.I is deleted in its entirety.

(12) *Woolworth's:* The Woolworth lease is a typewritten document drafted by the Tenant and contains no provision identical or similar to Article 16.I (Stip. ¶37; JX 1-Z-9 to 1-Z-12).

30. The standard form satellite lease also contains a "use clause" or "permitted use clause" which provides as follows:

> Such occupancy shall be for the purpose of ————.

The blank is completed in the course of the negotiation of the lease. All such use clauses provide that sales on the leased premises shall be of a specified type merchandise, such as "children's shoes," and shall be "for no other purpose whatsoever." (Stip. ¶33; JX 1-Z-7 to 1-Z-8; Stip. ¶35; JX 1-Z-8)

31. There are 28 instances (out of 111 satellites) in which the "use clauses" described in Finding 30 defines the use that a tenant may make of the premises in terms of the price of specified merchandise. This type of "use clause" typically reads as follows:

> Ups N Downs [Satellite Tenant's Name]: the retail sale of medium priced womens sportswear, swimwear and related accessories and incidental thereto the sale at retail of boots and sandals. The majority of the sales at the demised premises shall be sportswear and swimwear. (Stip. ¶34; JX 1-Z-8)

32. In seeking City Stores approval for a satellite tenant (pursuant to Section 31.3 of City Stores' lease), Tysons Corner developer has referred to "use clause" limitations on pricing and merchandise. Thus, a letter requesting such approval for G&G Shops of Virginia, Inc. indicated that the proposed tenant would be selling only "popular-priced" women's clothing. (Stip. ¶40; JX 1-Z-12)

33. All requests for approval of entry were granted by City Stores

including requests which mentioned, and those which did not mention, that the proposed tenant would be selling merchandise within a certain price range. (Stip. ¶41; JX 1-Z-13)

34. The no-discounter and use restrictions contained in satellite leases are continuing ones which cannot be changed without the approval of City Stores and the other major tenants. This continuing control exists because the preamble to Section 31.3, when read together with Sections 31.3(A), (B), (D) and (E) of the City Stores lease provides that modification, supplements, and renewals can only be made in the leases of any tenants in the Center unless the developer obtains City Stores' approval of the satellite's continued occupancy. (See lease provisions quoted in Finding 19.) Moreover, approval, once given, may be revoked if the satellite tenant engages in "business operations or merchandising practices" which respondent determines are detrimental to the shopping center (Lease Section 31.5(A)(2); JX 1-Z-155).

35. The interstate mails were used as the mechanism for approval by City Stores of satellite tenants. Pursuant to Section 31.3 of the City Stores' lease, requests for approval were sent from Tysons Corner Partnership headquarters in Maryland to City Stores' New York office and to the Lansburgh's division office in the District of Columbia. City Stores' officers in New York sent the request for approval letters from New York to Lansburgh's office in Washington. Lansburgh's letters approving tenants were sent from the District of Columbia to the Tysons Corner partnership at its Maryland address (Stip. ¶46; JX 1-Z-16 to 1-Z-17).

Space Limitations

36. In accordance with similar lease provisions in The May Company lease and the Woodward lease relating to the other department stores, the City Stores lease contains a provision limiting the floor area of The May Company store and the Woodward and Lothrop store. This limitation on the floor space of respondent's competitors is contained in Section 31.3(D) of the City Stores lease and reads in pertinent part as follows:

> * * * at no time prior to Termination Date shall the Occupant of the Woodward Store occupy, control or possess or operate more than two hundred forty five thousand (245,000) square feet of Floor area on the Shopping center Site * * * at no time prior to Termination Date shall the Occupant of the May Store occupy, control or possess or operate more than two hundred forty-five thousand (245,000) square feet of Floor Area on the Shopping Center Site* * *. (Stip. ¶21; JX 1-Q to 1-R)

37. While there is no proof that the space limitation contained in Section 31.3(D) caused actual competitive harm, the comparative floor area of deparment stores is a factor affecting competition between stores. As department store area decreases, a point is reached where a store must eliminate departments, lines, or depth of merchandise. That

point is reached for a store depending upon the general practice of the store and trading area regarding size, lines carried and merchandising techniques. At some point, which will depend upon the merchandising policy of the store, a department store's smaller store area vis-a-vis a competing department store's larger store areas may place the smaller store at a competitive disadvantage (Stip. ¶21; JX 1-S to 1-T).

38. City Stores did not want competing department stores in the same shopping center to have the right to expand beyond their original sizes unless City Stores also had expansion rights (Stip. ¶21; JX 1-S).

39. A recent expansion to The May Company store at Tysons Corner Center was made in accordance with the limitation contained in the City Stores lease. Although there is no evidence that The May Company or Woodward and Lothrop operate department stores in regional shopping centers which are larger than the 245,000 square feet limitation contained in Section 31.3(D), some department stores have expanded beyond the 245,000 square feet limitation (Stip. ¶21; JX 1-T).

40. In addition to the limitations on department store expansion, Part I of Exhibit M of the lease which provisions are incorporated by reference into Section 31.3 of the City Stores lease, impose space limitations on many of the prospective satellite tenants. Approval for their admission is conditioned on their observance of strict space restrictions. For example, the floor area that Raleigh's and Philipsborn could occupy was limited to 40,000 square feet. Similarly, Jelleff's is limited to 60,000 square feet, Richman Brothers and Ups 'n' Downs to 7500 square feet each, House of Fabrics, Fabric Tree, Petrie and Marianne to 10,000 square feet each, and Giant Foods to 35,000 square feet, no more than 15 percent of which can be used for nonfood merchandise (JX 1-Z-192 to 1-Z-193, 1-Z-197).

The Circumstances Surrounding The City Stores' Lease

41. The lease provisions which are described in detail in Findings 19, 20, 22, 34, 36 and 40 came about under the following circumstances. On or about May 29, 1962, Isadore Gudelsky and Theodore N. Lerner, the original developers of Tysons Corner Center, wrote a letter to Charles Jagels, who was then the president of City Stores' Lansburgh's division, granting City Stores an option to lease space for a Lansburgh's department store in the Tysons Corner Center "with rental and terms at least equal to that of any other major department store in the center." (Stip. ¶14; JX 1-J.)

42. City Stores' officials viewed the word "terms" in this letter as relating principally to such matters as rent, size, location and parking spaces. So-called rights of approval discussed earlier (Findings 18 to 26) were not among the terms that officials of City Stores considered essential to the agreement (Stip. ¶14; JX 1-J).

43. Officials of City Stores knew, however, on the basis of their general experience in the department store business, their familiarity with other shopping center operations of Theodore N. Lerner, and information they received about The May Company and Woodward and Lothrop leases that if their lease were substantially equal to those given these other major department stores (as they insisted it should be) the lease would indeed contain a provision giving all major tenants - *i.e., all* the department stores including City Stores - the right of approval over the entry of all other prospective tenants (Stip. ¶¶ 14, 15, 19; JX 1-J to 1-K, 1-L to 1-M).

44. The Gudelsky-Lerner option of May 29, 1962, was conditioned upon City Stores rendering assistance to secure certain zoning approvals which were necessary for the development of Tysons Corner Center. Notwithstanding the fact that the necessary zoning approvals were secured, the developers refused to offer City Stores a lease in the Tysons Corner Center. Rather, in order to obtain entry to Tysons Corner Center, City Stores filed suit against the developers of Tysons Corner Center in 1966 (*sub nom City Stores Co.* v. *Ammerman*, Civ. Action No. 98-66, D.D.C.) for specific performance of its rights under the May 29, 1962 option (Stip. ¶16; JX 1-K).

45. Prior to the filing of the complaint in 1966, the developers of Tysons Corner Center had negotiated a lease on December 6, 1965, with The May Company for the operation of a Hecht Department Store at Tysons Corner Center. On Nov. 1, 1965, a lease was signed with Woodward and Lothrop for the operation of a department store at the Center. The Woodward and Lothrop lease was substantially identical to the one signed by The May Company (Stip. ¶13; JX 1-I).

46. With the exception of the provision in the letter of May 29, 1962, relating to terms equal to those enjoyed by "any other major department store," and the knowledge that this would include approval rights (Findings 41 to 43), on no occasion prior to the filing of the lawsuit against the developers of the Tysons Corner Center was there any discussion or negotiation between the developers and City Stores with respect to the specific provisions to be contained in any lease which might be offered to City Stores. Specifically, the developer had no actual knowledge that City Stores wanted an approval clause as a way of eliminating potential price competition (Stip. ¶¶ 17, 18; JX 1-K to 1-L).

47. Throughout the trial in City Stores' action against the developers, in order to rebut the developers' contention that the May 29, 1962, letter was too vague to permit specific performance, counsel for City Stores indicated that City Stores would accept whatever lease terms the developers had in the interim granted to The May Company

and Woodward and Lothrop. City Stores did not know the specific terms of those leases until well after the lawsuit had been instituted. City Stores had been advised shortly before it filed its complaint against the developers that The May Company and Woodward and Lothrop had reserved the right to approve any other tenants in the Tysons Corner Center, but City Stores did not know the exact terms of such approval rights (Stip. ¶19; JX 1-L to 1-M).

48. On Apr. 5, 1967, the court ordered that City Stores be admitted to Tysons Corner Center and be given a lease with the terms equal to The May Company lease, subject to the court's approval. Prior to such approval, changes were made in The May Company lease in order to reflect differences relating to names, dates, construction schedule, architectural design and locations. Other portions of the lease which were clearly inapplicable to City Stores were waived, omitted, or modified (Stip. ¶21; JX 1-P to 1-Q).

49. At no time after it entered Tysons Corner Center did City Stores take any action to waive the "approval right." (See, Stip. ¶21; JX 1-P to 1-Q which specifies what *was* waived.)

50. Upon affirmance by the Court of Appeals of the District Court's order approving the format of the City Stores' lease, the lease was executed in Maryland on May 23, 1968. Neither court considered the lawfulness under the antitrust laws of the approval clause (Stip. ¶22; JX 1-T).

51. At no time after the filing of the lawsuit against the developer and prior to the execution of the City Stores' lease, did any discussion or negotiation between representatives of City Stores and representatives of the Tysons Corner developers concern the provisions and practices which are challenged in this proceeding. Except for insisting on a lease identical to that granted the other major tenants, City Stores did not negotiate or discuss with the developers any terms relating to the right to disapprove other tenant leases or rights relating to a limitation on floor space (Stip. ¶23; JX 1-T to 1-V).

52. In the spring of 1967, City Stores would not have been able to obtain from the Tysons Corner developers a lease for a Lansburgh's store at the Tysons Corner Center containing "approval" provisions had such provisions not been previously included in The May Company and Woodward and Lothrop leases (Stip. ¶23; JX 1-U to 1-V).

53. Had City Stores been in a position to negotiate independently a lease at the Tysons Corner Center, it would have accepted such lease even if it contained no provision dealing with the approval right (Stip. ¶23; JX 1-V).

54. City Stores' willingness to accept almost any terms for the Tysons Corner location resulted, in part, from City Stores' previous

failure to locate in other regional shopping centers in the Washington Metroplitan Area. In 1962, City Stores' officials considered it a competitive necessity for Lansburgh's to expand through entry into regional shopping centers in the Washington, D.C. suburbs and believed that the Tysons Corner Center presented one such opportunity (Stip. ¶23; JX 1-V).

The Fourth Department Store Issue

55. In a portion of its complaint filed in 1966 against the developers, City Stores alleged that:

> Plaintiff is informed and believes that Defendants have entered into binding, definitive lease agreements with the Hecht Company and Woodward & Lothrop for two major department stores in the Tyson's Corner Shopping center. Plaintiff is further informed and believes that Defendants are about to enter into a binding and definitive lease agreement for a third major department store in the center. Plaintiff is further informed and believes that the terms of the lease agreements entered into with Woodward & Lothrop and The Hecht Company contain clauses limiting the total number of major department stores in the center to three. Unless Defendants are immediately restrained and permanently enjoined from entering into a lease agreement with any other major department store tenant until Plaintiff has an opportunity to exercise its option, Plaintiff's right to accept a lease to become a major department store tenant at such rentals and terms as may be offered to any other major department store tenant will be irrevocably lost unless the then tenants waive the limitation to three. Furthermore, since Plaintiff's Option for a Lease entitles it to obtain a lease agreement with terms at least equal to the Woodward & Lothrop and The Hecht Company agreements, Plaintiff has a right to obtain a lease, including it as a major department store in the center, with a clause limiting the total number of major department stores in the center to three. Defendants should not be permitted to enter into a lease agreement for a third major department store in the center, since this would make it impossible for them to give Plaintiff the form of lease agreement to which it is entitled. Finally, if Defendants should consummate a lease agreement for a third department store and then, despite the three-store limitation, offer Plaintiff a lease, that lease would be of greatly reduced value to the Plaintiff in view of the increased competition at the center. This complaint therefore is being filed against the Defendants at this critical time so as to restrain threatened action which would frustrate and largely nullify the value of Plaintiff's Option for a Lease and violate Plaintiff's rights thereunder.

In addition to the general prayer for relief stated in Paragraph 14 of the Complaint which reads:

> That this Court adjudge and declare that Defendants are subject to a binding obligation, at the option of Plaintiff, to enter into a lease agreement with Plaintiff for a major department store at the Tyson's Corner shopping center at a rental and upon terms at least equal to the rental and terms of any lease agreement for a major department store with any other tenant at the center

City Stores' prayer for relief in the complaint in connection with this allegation reads:

> 15. That Defendants be enjoined and restrained, preliminarily and permanently, from entering into lease agreements for a third major department store at the Tyson's Corner shopping center until and unless -
>
> (1) Defendants shall execute a lease agreement with Plaintiff for a major department store at the center, or

(2) Plaintiff has refused, or failed within a reasonable time after specification in accordance with the procedure set forth in Paragraph 19 below, to accept the rental and terms of each of the existing lease agreements for a major department store at the center. (Stip. ¶20; JX 1-M to 1-O).

56. These statements in the complaint (Finding 55) were intended to protect City Stores' right to the third major tenant location in the Tysons Corner Center shown on the site plan. City Stores had learned through newspaper reports and industry sources that the developers intended to lease to another department store the third department store site planned for the center which Lansburgh's had a right to obtain under the May 29, 1962, option (Stip. ¶20; JX 1-O).

57. Further, because of the less desirable nature of a fourth undesignated location in the Center which the developers might have offered if City Stores ultimately prevailed in its litigation at a time when the third department store site was no longer available, it was important for City Stores to seek to enjoin the developers from leasing its designated site to another department store during the pendency of the lawsuit. The quoted statements were made in the complaint (Finding 55) to support the motion that was made, and thereafter granted, for such a preliminary injunction (Stip. ¶20; JX 1-P).

58. During the course of the litigation with the developers, City Stores offered to settle the case by allowing the developers to offer a fourth site to any other department store so long as the site given to Lansburgh's was acceptable to City Stores. This proposal was rejected by the developers or by one of the other major tenants. (Stip. ¶20; JX 1-P)

59. Article VIII of the City Stores-Tysons Corner lease (JX 1-Z-61) provides for "Landlord Construction" in accordance with the site plan which shows three department stores (Appendix A to Stipulation, JX 1-Z-18; references in the lease to Exhibit B may be read as referring to JX 1-Z-18).

III

DISCUSSION

"Commerce"

The threshold question in this case is whether the acts and practices alleged in the complaint-securing and enforcing the "right of approval" and certain other provisions in a regional shopping center lease - took place "in commerce" and are, therefore, subject to the jurisdiction of the Federal Trade Commission.

In arguing against the Commission's subject matter jurisdiction, respondent says that the determinative factor is that there is no evidence that the illegal use of the contested lease provisions occurred "in commerce" within the meaning of Section 5. I believe respondent is wrong on this specific point; besides, respondent's narrow statement of the "commerce" issue overlooks (1) the interstate nature of the *entire* transaction which is being questioned; (2) the essentially interstate pattern of City Stores' business and the direct connection between the questioned practices and respondent's overall business; and (3) the fact that the questioned practices tend to regulate the flow of commerce.

This case is about securing and enforcing certain provisions in a City Stores-Tysons Corner Center lease which was negotiated between a developer based in Maryland and City Stores officials located in New York City. The lease was executed in Maryland.[10] The subject of the cross-state negotiation was not simply a parcel of land located on an interstate beltway encircling Metropolitan Washington: the lease was for the operation of a deparment store which was to buy, sell, and advertise across state lines according to policies determined by a multistate corporation.[11] The lease included an approval clause and space limitations which when enforced governed the entry of other retailer-tenants into Tysons Corner Center including those from outside the Commonwealth of Virginia, who, in turn, were to buy, sell, and advertise across State lines.[12]

The implementation of the crucial approval clause took place across State lines since when City Stores was called upon to exercise its right of approval (or, if you will, its right of disapproval), this was done by the interstate mailing of either a request for approval or the lease itself from the developer in Maryland to City Stores in New York City or to Lansburgh's main office in the District of Columbia, and then on to City Stores in New York. In most instances, City Stores replied (either directly or through Lansburgh's) across State lines by use of the United States mail.[13] When approval was given, it meant that satellite stores could enter (at least to the extent that respondent controlled entry), but they were then subjected to lease provisions limiting their freedom to sell as discounters, including sales across State lines.[14]

While respondent's use of the United States mail to implement its approval power is an adequate basis for Commission jurisdiction (*Bernstein* v. *FTC*, 200 F.2d 404 (9th Cir. 1952); *Rothschild* v. *FTC*, 200 F.2d 39 (7th Cir. 1953, *cert. denied*, 345 U.S. 941 (1963)), it is unnecessary to rest jurisdiction on such limited grounds. Instead, I have also taken into account the fact that the approval right contemplates and is intimately linked with the process of satellite lease negotiation (see discussion, *infra*, especially text at notes 26 to 40). This entire chain of events - from securing the City Stores lease to the imposition of no-discounting provisos on satellites-took place "in commerce"[15] although the underlying agreements pertain to leases of realty interests which are traditionally considered local in nature. See, *e.g., United States* v. *South-Eastern Underwriters Assn*, 322 U.S. 533, 547 (1944). Moreover, the events relating to Tysons Corner Center are part and parcel of a multi-state department store business directed by City Stores from its New York headquarters.[16] See, *e.g., Holland Furnace Co.* v. *FTC*, 269 F.2d 203 (7th Cir. 1959), *cert. denied*, 361 U.S. 932 (1965). And finally, the lease provisions establish a control mechanism for regulating the "flow of commerce" in the sense that it enables respondent to determine who enters Tysons Corner Center and how these entrants are able to do business across State lines.[17] See, *e.g., Ford Motor Co.* v. *FTC*, 120 F.2d 175 (6th Cir. 1941), *cert. denied*, 314 U.S. 668 (1941). All of these factors add up to a more than adequate basis for Commission jurisdiction.[18]

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[10] Findings 1, 8, 50.

[11] Findings 1, 2, 3, 7.

[12] Findings 16, 17, 19.

[13] Finding 35.

[14] Findings 27, 28.

Despite all these indicia of interstate commerce, respondent argues that one of the key incidents involved in this case - the attempted entry of the discounter Dalmo and the imposition of certain no-discounter conditions, including restrictions on Dalmo pricing in Virginia, Maryland and the District of Columbia - did not occur "in commerce" since no letter of approval or disapproval was mailed by City Stores. As I will indicate later, I believe the "Dalmo incident" is significant as illustrative of the inherent anticompetitive nature of the approval clause. I do not accept, however, respondent's version of where this incident took place.

By the terms of the lease, City Stores in New York City may allow Dalmo's entry (subject to the no-discounter provision) by taking a positive step (sending an approval letter) or by doing nothing at all.[19] Should City Stores send such an approval letter from New York, the act of approval would unquestionably be "in commerce." According to respondent, however, if its New York headquarters happens to indicate approval by *not* sending a letter, there is no interstate act, even though this negative "response" means the same as affirmatively sending a letter of approval.

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[15] Findings 15, 16, 19, 21, 22, 24, 27, 28, 30, 31, 32, 33, 35, 40, 41, 50.

[16] Findings 1, 2, 3, 35.

[17] Findings 17, 19, 24, 28, 30, 31, 32, 34, 36, 40.

[18] Clearly this case does not involve the purely local practices challenged in such cases as *FTC* v. *Bunte Bros.*, 312 U.S. 349 (1941) (where goods were manufactured and sold in one state), or *Plum Tree, Inc.* v. *N.K. Winston Corp.*, 351 F.Supp. 80 (S.D.N.Y. 1972), and *Gaylord Shops, Inc.* v. *Pittsburgh Miracle Mile Town & Country Shopping Center, Inc.*, 219 F.Supp. 400 (W.D.Pa. 1963) (where for purposes of the Robinson-Patman Act, a lease was held not to be a "commodity" sold in commerce), or *St. Anthony-Minneapolis, Inc.* v. *Red Owl Stores*, 316 F.Supp. 1045 (D. Minn. 1970), and *Savon Gas Stations No. Six, Inc.* v. *Shell Oil Co.*, 309 F.2d 306 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963) (where there were no sales across State lines or use of the mails by an interstate seller to control the flow of commerce).

[19] Finding 22.

I fail to see why the Commission's jurisdiction should be circumscribed by the form in which City Stores in New York chooses to convey across a state line its approval of an entrant. Whether the letter is sent or not, the substantive result is the same - respondent has agreed to the entry of a Wash., D.C. discounter into a Virginia shopping center subject to the anticompetitive terms indicated in a letter from the developer who is based in Maryland. With respect to the "commerce" question, substance rather than form controls, see, *e.g.*, *FTC* v. *Pacific States Paper Trade Association*, 273 U.S. 52 (1927), therefore, I have concluded that the exercise of a "negative option" from New York as determinative of the conditions of entry into Virginia is as much a communication "in commerce" as the positive sending of a letter of approval.

"The Right of Approval"

Turning to the main issue in the case, the approval clause, I believe the key point is whether the record shows that this provision in the City Stores-Tysons Corner lease - *i.e.*, the right of City Stores to veto new entrants into Tysons Corner Center - has actual or potential anticompetitive effects. If the record supports such a conclusion, then the circumstances surrounding respondent's acquisition of the approval right are largely, but not entirely, irrelevant.

To start with, the stipulation compels a conclusion of *almost* complete indifference on the part of City Stores in acquiring approval rights. I say "almost" because respondent knew that it would get approval rights by merely insisting on the same treatment as that extended to The May Company and Woodward and Lothrop.[20] In fact, it was given the same treatment, and it ended up with the right of approval.[21] Moreover, once it got approval rights and entered Tysons Corner Center, it did nothing to rid itself of the controversial clause, although other clauses *were* waived.[22] I do accept, however, most of respondent's contentions with respect to this acquisition: given its less than robust market position, it could not have coerced the approval rights as a condition of entry;[23] it would have entered Tysons Corner without the approval right;[24] and the developer had no actual knowledge that City

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[20] Findings 43, 45, 46, 47, 51.

[21] Findings 18, 19.

[22] Findings 48, 49.

[23] Findings 4, 5, 52.

[24] Findings 53, 54.

Stores would exercise approval rights in an anticompetitive way, and, especially, to bar discounters.[25] As I indicated at the outset, these facts are not entirely irrelevant - for if the approval right *is* demanded by a major department store as a condition of entry, it tends to show an initial inclination to use it in an anticompetitive way and one can safely assume that anticompetitive effects will naturally follow. Obviously, if the record *did* show coercion or zeal on the part of City Stores in obtaining approval rights, complaint counsel would have made much ado about this, and they would have argued that anticompetitive effects must surely follow. Where there is no such evidence, assumptions about the inevitability of adverse effects cannot be made. But, on the other hand, the chaste circumstances surrounding the acquisition does not prove the *absence* of anticompetitive effects, and the question remains whether there is other evidence that trade may be restrained by the approval right.

The short answer to this question is that I believe the record will support the conclusion that the approval clause in the City Stores' lease has a substantial tendency, capacity, and potential to suppress price competition.

What the record shows is that the developer and a potential entrant recognized that the approval clause clearly gave City Stores the right to bar entry to a discounter if respondent chose to do so. This is the plain meaning of the "Dalmo Incident" where, *pursuant to the approval clause*, the developer asked City Stores to approve the entry of this well-known Washington area discounter on the condition that it would refrain from "advertising discount or bargain sales at *all* of their present stores" - that is, not only in Tysons Corner Center but in *all* the Dalmo stores in Virginia, Maryland, and the District of Columbia.[26]

Also pursuant to the approval procedure, City Stores was asked to approve (and it did) the entry of Sun Radio another important Washington area discounter, who pledged in its lease not to call itself a discounter in *any* of its stores or "include in any of its advertising or other material in its stores, any advertising or reference to the effect that it continuously sells or offers merchandise for sale at bargain prices."[27]

It is of no moment that the no-discounter terms of the Dalmo letter and the Sun lease were neither requested nor suggested by City Stores, or that City Stores did not discuss the no-discounter language with the developers or the other department stores.[28] On the contrary, these facts show that the mere presence of an approval clause in the lease of a traditional department store is a signal to both the developer and a discounter, that approval may be withheld unless the discounter image is changed, and, therefore, entry should be sought on the basis that price competition will be held in check.

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[25] Finding 46.

[26] Finding 21.

[27] Finding 24.

[28] Finding 25.

The conclusions which I draw from the Dalmo and Sun incidents are in no way changed by respondent's assertion that it would have approved Dalmo's or Sun's entry with or without the no-discounter provisos.[29] In fact, when it gave approval (by not indicating disapproval), it did not tell the developer that as far as it was concerned, the no-discounter conditions should be eliminated.[30] But more importantly, I know of no principle of antitrust law which would allow the quality of competition in a significant retail area like Tysons Corner Center to be determined by how lenient City Stores may or may not be, or how much price cutting it may or may not tolerate in a particular moment of its history.[31]

Since the clear meaning of the Dalmo and Sun incidents is that an approval clause means to both the developer and a prospective entrant that an "anchor" tenant, like City Stores, may determine if it wants or does not want price competition (and the developer and the price-cutter entrant should act accordingly), the potentially adverse effect of the clause is manifest. There was no need that complaint demonstrate actual adverse effect: the Commission may stop a practice in its incipiency before all price competition is eliminated.[32] As it happens, there is circumstantial evidence which serves to show that the no-discounting implications of the approval clause registered with practically all the satellite tenants. Many entered Tysons Corner Center subject to City Stores' approval, and most signed a lease which said that they could not operate a "discount store or a bargain store similar to Korvette nor continuously sell at discount or bargain prices."[33] In addition, there is evidence that the right of approval may have prompted other variations of price-related conditions on entry.

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[29] Findings 26, 33.

[30] Finding 26.

[31] In *Northern Pacific Railway Co., et al.* v. *United States*, 356 U.S. 1 (1958), the Supreme Court specifically rejected this kind of "leniency" argument:

> The defendant contends that the "preferential routing" clauses are subject to so many exceptions and have been administered so leniently that they do not significantly restrain competition. It points out that these clauses permit the vendee or lessee to ship by competing carrier if its rates are lower (or in some instances if its service is better) than the defendant's.
>
> Of course if these restrictive provisions are merely harmless sieves with no tendency to restrain competition, as the defendant's argument seems to imply, it is hard to understand why it has expended so much effort in obtaining them in vast numbers and upholding their validity, or how they are of any benefit to anyone, even the defendant. But however that may be, the essential fact remains that these agreements are binding obligations held over the heads of vendees which deny defendant's competitors access to the fenced-off market on the same terms as the defendant. 356 U.S. at 11-12, *accord*, *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 458 (1922).

[32] *Fashion Originators Guild of America* v. *FTC*, 312 U.S. 457, 466 (1941); *FTC* v. *Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-395 (1953); *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 322 (1966).

[33] Findings 20, 27, 28.

Thus, the record shows that City Stores, *again, in the context of the developer securing respondent's approval*, was informed that a new entrant, G&G Stores, would only offer "a middle-priced line of shoes."[34] Entry of other satellites, which was similarly conditioned on City Stores' approval, was limited to the sale of merchandise of a specified price and excluded the sale of lower-priced goods.[35] These are continuing restrictions on the satellites which cannot be removed without respondent's approval.[36]

In the commercial world, anticompetitive commitments like these are neither inadvertently imposed nor lightly accepted, and from what we know of the Dalmo incident, alone, it is reasonable to surmise that it was the approval clause which actually inspired, or at least tended or had the capacity to inspire these price-restrictive provisions.

It does not help respondent's cause to say that it always approved the entry of all satellite stores:[37] the record shows that while the satellites may indeed have had respondent's approval, they entered with their hands tied behind their backs. Nor do I think it decisive that there is no direct evidence showing that City Stores negotiated the anticompetitive satellite clauses or requested that conditions be imposed on Dalmo, Sun, and others,[38] or intended that these conditions be imposed.[39] As I indicated above, respondent had to do very little once it obtained, in the form of an approval clause, the right to say "yes" or "no" to price competition.

In defense of the clause, respondent has also vigorously pressed the argument of "unused power." A common thread running throughout its brief is that where power (*i.e.*, power to disapprove) is unexercised, then no violation can be found (respondent's Main Brief, at pp. 54, *et seq.*.). The trouble with respondent's position is that it requires me to accept the notion that where a major tenant in a shopping center obtains the approval right, the right is only "exercised" when City Stores takes affirmative action to exclude a discounter or otherwise control the terms of entry of potential competitors. But the evils inherent in the approval right can work without positive action by respondent. The approval right is "exercised" quite effectively simply by standing as a reminder to both the developer and potential entrant that if they do not toe the line, the right to disapprove may be invoked.

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[34] Finding 32.

[35] Findings 30, 31.

[36] Finding 34.

[37] Finding 33.

[38] Finding 51.

[39] Proof of specific intent is unnecessary except in attempt to monopolize cases. Thus, in *United States* v. *Masonite Corp.*, 316 U.S. 265 (1942), the Supreme Court said:

> [a]s respects statements of various appellees that they did not intend to join a combination to fix prices, we need only say that they must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say to the contrary. 316 U.S. at 275.

That City Stores never found it necessary actually to use the power by exercising its right to disapprove does not change the highly anticompetitive implications of its mere existence.[40]

Its mere existence, however, does not amount, as complaint counsel would have it, to a horizontal conspiracy to fix prices, and therefore *per se* illegal. Complaint counsel argue that because City Stores has the right of approval, respondent becomes "enmeshed * * * in combinations with the developer and the satellite tenants to fix or control prices, eliminate discount selling, and eliminate discount advertising" (complaint counsel's Main Brief, at p. 15). "Enmeshed" or not, there is no agreement between City Stores and the satellites fixing or tampering with their respective prices and without such an agreement, tacit or otherwise, there can be no conspiracy.[41] In rejecting this per se theory of complaint counsel, I am distinguishing between an anticompetitive practice which has pricing effects and "price-fixing." While the pricing effects may properly be taken into account in deciding whether practices are unreasonable or unfair, this is not the same as saying that receipt or enforcement of the approval clause *is* a price-fixing combination or conspiracy and therefore *per se* illegal, irrespective of the effect.[42]

With theories of per se combination or conspiracy out of the way, I am deciding this case essentially on the basis of the more pragmatic and less conceptualistic branch of Section 5- *i.e.*, an approach which emphasizes that "unfairness" turns on considerations of context, effect, justification and consistency with antitrust policy.[43] Under this approach it is significant that even if one cannot find that the approval clause "amounts" to price-fixing, there is evidence showing that the approval right may have highly anticompetitive effects on competition, and especially price competition.[44]

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[40] The courts have recognized the anticompetitive implications of restrictive power obtained but not *actually* invoked. In *F.C. Russell Company* v. *Consumers Insulation Company*, 226 F.2d 373, 376 (3rd Cir. 1955), the court said:

> The inchoate threat which these circumstances engender hangs in the air and we may doubt that that threat is without its effect in a highly competitive market.

See, also *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451 (1922); *Northern Pacific Railway Co., et al.* v. *United States*, 356 U.S. 1(1958).

[41] The only conspiracy theory that I can envision is that, arguably, the approval clause has the effect of placing City Stores in the center of a "hub and spokes" combination (see, *e.g.*, *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939)), whereby the satellites (*i.e.*, the "spokes") agree not to sell at discount prices because respondent (the "hub") will not give entry approval. Complaint counsel, however, are a long way from meeting the test of *Interstate Circuit* since there was no showing that the response of any satellite to the existence of the approval right was dependent upon a similar response by other satellites. Even under the most expansive reading of conspiracy law, identical but not interdependent responses to the same economic fact is not an "agreement" by any stretch of the imagination. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658 (1962).

[42] Nor do I accept complaint counsel's alternative per se theories grounded on *Associated Press* v. *United States*, 326 U.S. 1 (1945), and *United States* v. *Terminal Railroad Association*, 224 U.S. 383 (1912). It is doubtful that these are per se cases, and, in any event, they could be viewed as concerted refusals to deal (*i.e.*, boycotts as in *Fashion Originators Guild of America* v. *FTC*, 312 U.S. 457 (1941), and *Klor's Inc.*, v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)), in which competitors combined to deny an essential service (membership in a newspaper agency and access to a St. Louis terminal which every railroad had to pass through). With the dismissal of Count I, there is no charge left in this case that City Stores combined with the other department stores to boycott or do anything else. As for *Gamco, Inc.* v. *Providence Fruit [Produce Building, Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952), this "bottleneck" case does not apply a per se approach - the case turned on (1) the desirability of space in the Produce Building, (2) the competitive implications of the failure to renew the lease, (3) the business justification for a denial by a monopolist of access to a substantial economic advantage. This is hardly a per se approach and I have looked to similar factors in the unfairness analysis to be discussed above.

Starting with this effect, I next look to the setting. It was not necessary that complaint counsel show that Tysons Corner Center was a "relevant market" as that term is used in merger cases.[45] It is enough that the record shows, as it does, that Tysons Corner Center is a significant center of business where if competition is restrained, a substantial number of consumers will have to pay the price.[46]

While I believe that the crucial considerations are probable anticompetitive effects, the economic setting, and lack of justification for the practice, I have also concluded that the acquisition of the approval right violates the policy of the antitrust laws which disfavors the use of vertical leverage to accomplish restraints on pricing. By this I mean, not only would it have been patently illegal for City Stores to have entered into a horizontal agreement with new tenants about any aspect of pricing, but the same illegal result could not have been legally accomplished through an agreement between respondent and Tysons Corner Center by which the developer agreed to allow entry depending on whether a potential satellite gave assurances that prices would be maintained at a satisfactorily high level.[47] For all practical purposes the approval clause accomplishes the same end. It is a small step from (a) City Stores agreeing with the developer on how Tysons Corner Center will use its discretionary control over space, that is, entry to (b) City Stores, itself, assuming this same control and with it the right to veto the entry of price competition. In short, the acquisition of approval power is practically indistinguishable from what respondent could not have legally obtained by virtue of an express agreement preventing the developer from leasing to price cutters. Accordingly, it follows under Section 5 (where the form in which respondent has cast the transaction does *not* govern[48]), that because the clause operates in much the same way as an agreement which is clearly unlawful under the antitrust laws, this, too, weighs in favor of finding it unfair. It must be emphasized (as I indicated earlier with respect to complaint counsel's per se theories) that I am not saying that an approval clause is per se illegal because it amounts to a price-fixing agreement. What I am saying is that where a practice violates the underlying public policy of the price-fixing cases this is a factor, along with effects and lack of business justification, which should be taken into account in the balancing process which is at the heart of the unfairness analysis.[49]

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[43] On the record of this case, it is not necessary to test the outer limits of Section 5 where the Commission may predicate a finding of unfairness "independent of possible or actual effects on competition." *FTC* v. *Sperry and Hutchinson Co.*, 405 U.S. 233, at 248 (1972). In *S & H*, the Court pointed to certain factual considerations as an alternative test for unfairness. The Court said that the Commission may proscribe practices as unfair "in their effect upon consumers" (*id.*, at 239), clearly a factual consideration. And again, the Court cited favorably as a factor in determining unfairness "whether it causes substantial injury to consumers (or competitors or other businessmen)" (*id.* at 245, note 5). The legislative history of Section 5 shows a similar overriding interest in giving the Commission the power to determine unfairness by referring to the facts of a particular case rather than abstract standards or rigid formulae. See, Baker and Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 Vill. L. Rev. 517, 560 (1962). Thus, the floor debates on Section 5 indicate a congressional purpose that the law of unfairness be fashioned on the facts of each case by a "rule of reason" balancing of the business reasons for the conduct against the practice's adverse effects upon the public interest. 51 Cong. Rec. 12915, 12916 (1914) (remarks of Senator Cummins). While there may be cases where the destructive effect of the practice is so apparent as to preclude even the proffer of justification evidence, see, *e.g.*, *Atlantic Refining Company* v. *FTC*, 381 U.S. 357 (1965), we do not reach that question here since respondent was encouraged to present a business justification but did not do so.

[44] See discussion earlier, especially text at notes 26 through 39.

[45] Where the practice involves the exclusion of competition or effects on prices, the courts and the Commission take as market just that market which the concern itself takes for its field of activity. It is assumed that the "field" sufficiently describes a market, for otherwise what would be the point of the effort to exclude or control. *Washington Crab Assn*, 66 F.T.C. 45, 119 (1964).

[46] Findings 9, 10, 11, 12. See, also, *City Stores* v. *Ammerman*, 266 F.Supp. 766, 770 (D.C.D.C. 1967), where the court says that Lansburgh's had reached the conclusion "that the Tysons Corner site was preferable to any other in the area." The district court opinion was affirmed in *Ammerman* v. *City Stores*, 394 F.2d 950 (D.C. Cir. 1968), where the court set out the following text from a 1962 letter from Lansburgh's president (Jagels) to the Tysons Corner Center Developer (Lerner):

> We are convinced that the Gudelsky-Lerner tract, to which you refer as the Tyson's Triangle, is superior to any other. Being located on the Beltway, it has an unexcelled advertising value. Its location on both Route 7 and Route 123 gives it access to all local traffic.
>
> Since the Tyson's Triangle site will be developed almost exclusively to commercial uses, it also assures a live center with no dead spots. It is also readily available to automobile traffic without other competing uses within the Triangle.

394 F.2d at 952, note 4.

Given these factors - probable anticompetitive effects, in a significant setting, and a practice which violates the policy of the antitrust laws - I believe that complaint counsel have made out a prima facie case. This means that in the absence of a clear showing of a valid business justification compatible with the aims of our national antitrust policy the clause must be striken.

It is well established that the question of business justification is a burden which respondent must assume since it controls the facts and presumably knows what it reasonably requires.[50] I can only conclude that since City Stores has not come forward with any business justification, it has none. Moreover, at every turn in this proceeding, respondent has insisted that it never really wanted or needed the right of approval, or considered it important. As I indicated earlier, while this may indeed show a lack of anticompetitive intent, it also tends to show that approval rights are not justifiable. As it happens, it is difficult even to conjure up a legitimate (*i.e.*, non-anticompetitive) function of the approval right since the lease contains elsewhere adequate protection for any concern over the "image" of the shopping center as a whole: Section 31.3(C) requires the developer to select financially sound tenants of good reputation.[51]

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[47] *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-223 (1940). Nor could the same result have been brought about by an agreement, direct or implied, between developer and new tenant to lease space on the condition that prices are maintained at a set level. See, *e.g.*, *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911); *FTC* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).

[48] *FTC* v. *Curtis Publishing Co.*, 260 U.S. 568, 581-582 (1923); *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 397 (1953); *Grand Union Co.* v. *FTC*, 300 F.2d 92, 99 (2d Cir. 1962).

[49] Public policy considerations are one of the three alternative sources of unfairness standards identified in the Statement of Basis and Purpose supporting the Cigarette Rule and favorably cited by the Supreme Court in *S&H*. This "public policy" test turns on whether S&H's conduct falls within the "penumbra" of some established concept of illegality. *FTC* v. *Sperry and Hutchinson*, 405 U.S. 233, 245, N. 5 (1972). Earlier, in *Atlantic Refining*, the Supreme Court said:

> As our cases hold, all that is necessary in § 5 proceedings to find a violation is to discover conduct that "runs counter to the public policy declared in the Act" . . . But this is of necessity, and was intended to be, a standard to which the Commission would give substance. In doing so, its use as a guideline of recognized violations of antitrust laws was, we believe, entirely appropriate. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of antitrust violations . . . When conduct does bear the characteristics of recognized antitrust violations it becomes suspect, and the Commission may properly look to cases applying those laws for guidance. *Atlantic Refining Co.* v. *FTC*, 381 U.S. at 369-70 (1965) (citations omitted).

While respondent has no factual justification for the approval provision, it argues that "approval" is similar to the exclusive dealing rights allowed in such cases as *Packard* and *Schwing*.[52] (Respondent's Main Brief, at p. 50, *et seq.*)

In my view, the "exclusive dealing cases" are inapposite and respondent should not be heard to argue that since it could have been designated as the "exclusive" retail outlet in Tysons Corner Center, it may be the party to a less restrictive provision which gives it the right to exclude others. Exclusive arrangements, contrary to respondent's argument, are *not per se* legal. If City Stores *had* been given exclusive retailing rights in Tysons Corner Center, the legality of that grant would have been carefully examined to determine the circumstances and significance of the exclusivity including possible justification in eliminating all competition. As a subject of conjecture, I cannot conceive of the circumstances under which the elimination of *all* competition by operation of an exclusive grant to a tenant could be justified in the context of a giant regional shopping center.[53] But obviously respondent cannot avail itself of a hypothetical justification as an explanation for what actually happened in this case. Here there was no justification presented; City Stores obtained the right to determine the conditions of entry; and that right, as the record shows may lead to severe effects on price competition which in no way is condoned by the exclusive dealing cases.

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[50] As early as *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899), the rule was enunciated that a proponent of a contract of restraint may attempt affirmatively to justify it by a showing that it is ancillary to and necessary to the achievement of the lawful main purpose of the contract, that the duration and scope of the restraint is not substantially greater than is necessary to achieve that purpose, and that the restait is otherwise reasonable in the circumstances. See, *White Motor Co.* v. *United States*, 372 U.S. 253, 270 (Brennan, J., concurring). While I have looked to *Addyston* for a standard on the justification question, this is not to suggest that I accept the notion that significant anticompetitive practices should be excused because the covenantees subjectively viewed the restraint as "ancillary" to their basic deal. If that were the test, every restraint would be lawful.

[51] Finding 19 (Para. 31.3(C)). The lease also contains provisions requiring that the architectural design concept, quality of construction and materials, the decor, and color of the stores harmonize and be compatible with respondent's store. (JX 1-Z-63; JX 1-Z-171).

[52] *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); *Schwing Motor Co., Inc.* v. *Hudson Sales Corp.*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 822 (1957). As far as I know, there are no decided federal cases, either in the courts or before the Commission, which have treated directly with the merits of the "right of approval" under the "exclusivity" doctrine or any recognized doctrine of the antitrust laws. In *Dalmo Sales Co.* v. *Tysons Corner Regional Shopping Center*, 308 F.Supp. 988 (D.D.C.), *aff'd*, 429 F.2d 206 (D.C. Cir. 1970), the court - considering the very same lease provisions challenged herein - denied a temporary injunction. While indicating its doubts that a per se violation could be established (as a basis for a temporary injunction), the court said a rule of reason analysis might be applicable.

To sum up, on the basis of the record in this case, I have concluded that blanket approval clauses may lead to the elimination of price competition. To allow such clauses to exist in such economically significant places as Tysons Corner would be an open invitation to this respondent and other major department store retailers to divide up the country into protected enclaves where they would be free to set the metes and bounds of meaningful competition. As far as I know, City Stores never enjoyed such control over their actual or potential competitors in our older downtown business centers, and I fail to see why regional shopping centers - the "downtowns" of the future - should be turned over to this form of private regulation.

The Fourth Department Store Issue and the Limitation on Department Store Space

Complaint counsel maintain that the record shows an agreement between Tysons Corner Center and respondent to boycott a fourth department store. All that the record shows on this point is that in 1966 when it became apparent to City Stores that it would have to litigate to get into Tysons Corner Center, it told the District Court that if the developer was not immediately enjoined, one of the three planned department store sites would be given to another and the most that City Stores could hope for would be a less desirable and apparently unplanned fourth site.[54]

The record also shows that the outcome of the litigation was that City Stores got the third site and signed a lease for the third department store site. But complaint counsel argue that because the lease incorporated by reference the original plan of the shopping center,[55] this shows an agreement to limit the number of department stores to three since the plan only shows three department store sites.

On its face, I find nothing sinister in the fact that a developer's plan is incorporated into a lease. How else would a tenant know what he is getting into? Nor, as far as I know, is there anything illegal in the developer conceiving of a shopping center as having a triangular configuration with three major department stores anchoring each corner. If this triangular configuration with its apparently natural limitation to three department stores had some roots in a conspiracy to boycott which involved respondent, then complaint counsel should have put in some evidence on the point.[56]

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[53] The rationale of *Schwing* and *Packard* (that a weak manufacturer may grant exclusivity to a seller who was losing money in order to save or build a faltering distributorship for effective interbrand competition) was recognized to be of "necessarily limited scope" in Justice Brennan's concurring opinion in *White Motors Co.* v. *United States*, 372 U.S. 253, at 269, note 8 (1963).

[54] Finding 55, 56, 57, 58.

[55] Finding 59.

Expansion and Space Limitations

The limitation on department store expansion is another matter, however. This was brought about by agreements between the developer and each department store, including respondent, which provided that the other two may not expand beyond 245,000 feet.[57] It would have been illegal for the department stores to enter into such an agreement among themselves restraining competition and the same result cannot be legitimized by saying that this is merely an innocent bilateral arrangement between developer and tenant.

I have reached the same conclusion with respect to the provision in City Stores-Tysons Corner lease which, in effect, sets the size of many of the satellite tenants.[58]

City Stores has no business entering into an agreement with a developer and indirectly with its competitors which determines how big its competitors (or City Stores, for that matter) will get. Size, whether it be that of department stores or satellites, is such a significant aspect of retail competition[59] that a restrictive agreement on this subject would be condemned under the Sherman Act even though it is competition rather than price itself. See, *e.g.*, *Mandeville Island Farms, Inc., et al.* v. *American Crystal Sugar Corp.*, 334 U.S. 219, 235-236 (1948); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-224 (1940); *National Macaroni Manufacturers Ass'n* v. *FTC*, 345 F.2d 421 (1965).

IV

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over respondent, and the acts and practices charged in the complaint took place in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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[56] As far as I can determine the three department store configuration grew out of an early agreement between the developer, Hecht (*i.e.*, The May Company) and Woodward and Lothrop. City Stores "was not responsible for these actions* * *." *City Stores Company* v. *Ammerman*, 266 F.Supp. 766, 779 (D.C.D.C. 1967).

[57] Finding 36.

[58] Finding 40.

[59] Findings 6, 37, 38, 39.

2. Respondent has caused the inclusion or enforcement of lease provisions in its Tysons Corner Regional Shopping Center lease which has the tendency to restrain trade and is an unfair method of competition. Specifically, a provision giving respondent the right to disapprove other tenants has the undue tendency, capacity, or effect of:

a. Controlling and maintaining retail prices.

b. Allowing respondent to choose its competitors and to exclude actual and potential competitors who might compete in price.

c. Eliminating discount advertising and discount selling.

d. Denying the public the benefit of price competition.

e. Giving respondent continuing control over its competitors especially the pricing decision of its competitors.

3. Respondent has caused the inclusion or enforcement of lease provisions in its Tysons Corner Regional Shopping Center lease relating to size of competing department stores and satellite stores which has the tendency and effect of eliminating or restraining competition between respondent and other stores.

4. Respondent has offered no business justification for the provisions described above.

5. Said lease provisions, as hereinabove described, are all to the prejudice and injury of the consuming public and respondent's competitors, and constitute a restraint of trade and an unfair method of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

V

THE ORDER

There are several aspects of the remedy problem which I believe require some amplification.

First, complaint counsel insist that respondents be subjected to an order forbidding it from conspiring with other department stores about the approval right although there is no such conspiracy charge left in the case, and, in fact, the charge (Count I of the complaint) was removed with the full acquiescence of complaint counsel. This odd recommendation is justified by an arcane reference to the fact that the *other* Tysons Corner deparment stores ("The May Company" and "Woodward and Lothrop") have consented to a conspiracy provision in *their* orders and under the rubric of "fencing in," City Stores should get the same treatment.

As I understand complaint counsel's theory, it works as follows: when a respondent does not consent to a conspiracy order and chooses to litigate that issue, but complaint counsel later backs down and the issue is removed from the case, complaint counsel, nevertheless, is entitled to a conspiracy order because in other cases which were *not* litigated, and where complaint counsel did *not* back away from the conspiracy charge, the respondents consented to such an order. To include a conspiracy order under this rationale would have the effect of turning logic on its head, and adding a "Catch 22" to the antitrust laws. I will have no part of it.

Next, I turn to respondent's request for a proviso allowing a measure of control over satellite entry in the form of a clause permitting a veto over "objectionable types of tenants." Respondent argues that The May Company and Woodward and Lothrop consent orders contain such an exception to the absolute prohibition against any form of approval clause. While the Commission may have some discretionary power in this respect, I am limited to the record. And on the basis of the record before me, I cannot allow respondent such open-ended control over entry which can work in much the same way as an approval clause. I have concluded that an approval clause, no matter what form it may take, is nothing more than a device for working anticompetitive mischief and it should be banned outright.

As I indicated earlier, whatever interest respondent may have in protecting the "image" of the center as a whole, this is adequately met by a lease provision requring the developer to select financially sound tenants who have good housekeeping habits. The order will have a proviso expressly allowing such selection criteria.[60] Any other limitations on entry into shopping centers should be left to a less self-interested arbiter of what is in the best interests of the entire center - *i.e.*, to the discretion of the developer who is concerned with the center as a totality, or to local government which is the conventional instrumentality for determining what is or is not a socially acceptable business. I would not allow major department stores to regulate competition in these economically important retail centers by giving them the right of deciding which of their competitors are "objectionable." Besides, in this case City Stores has insisted in the most vehement terms possible that it has no real interest in the rights of approval, and it introduced no evidence whatsoever to show that approval rights in *any* form are justified.

Finally, respondent argues in favor of limiting the scope of the order to the Washington, D.C. area. This is understandable since the record shows that it no longer operates in Washington, but it does have at least ten shopping center operations elsewhere, and in the future it may enter still others. The approval right in the form of a grant to a major tenant like City Stores has a tendency and capacity to restrain price competition. It should be banned wherever it exists or may exist. There is no basis whatever for a geographical limitation on the order.[61]

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[60] I believe that, minimally, there is a built-in ambiguity in a proviso which would permit respondent to question the selection of a tenant on the grounds that the tenant may upset the "balance" or "diversification" of the center. An agressive discounter may indeed upset the "balance" (whatever that means), and in the name of "diversification" respondent could lodge an objection to the entry of a direct competitor who instead of offering more variety, offers consumers a choice in terms of lower prices for the same merchandise as that sold by respondent.

The order will, however, contain provisos allowing lease provisions which identify the major tenants and establish a layout for the center. Neither provision, as I concluded earlier, has been shown to be anticompetitive.

Accordingly, the following order will be issued:

ORDER

I

For purposes of this Order, the following definitions shall apply:

A. The term "respondent" refers to City Stores Company, its operating devisions, its subsidiaries, and their respective officers, agents, representatives, employees, successors or assignees.

B. The term "shopping center" refers to a group of retail outlets in the United States of America planned, developed and managed as a unit and containing (1) a total floor area designed for retail occupancy of 200,000 square feet or more, of which at least 50,000 square feet is for occupancy by tenants other than respondent, (2) at least two tenants other than respondent, (3) at least one major tenant, and (4) on-site parking.

C. The term "tenant" refers to any occupant or potential occupant of retail space in a shopping center which occupancy is for the sale of merchandise or services to the public, whether said occupant leases or owns said space, but the term does not refer to an occupant of space within the store occupied by respondent, which occupant operates a department for respondent pursuant to a license from respondent.

D. The term "major tenant" refers to a tenant providing primary drawing power in a shopping center. A tenant which occupies at least 50,000 square feet of floor area will be deemed to provide primary drawing power.

II

It is ordered, That respondent, in its capacity as a tenant in a shopping center, cease and desist from obtaining, making, carrying out or enforcing, directly or indirectly, an agreement or provision of any agreement, whether applicable to the shopping center or to any expansion thereof, which:

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[61] Nor should the order be limited, as respondent requests, to a prohibition against only those leases which by their terms exclude price competition. Such an order would be less than useless since respondent would be free to negotiate for the very blanket approval clause which can cause the competitive harm described in this initial decision. The result would be the exact opposite of "fencing in," *FTC* v. *National Lead Co.*, 352 U.S. 419 (1953); it would leave the barn door wide open.

1. grants respondent the right to approve or disapprove the entry into a shopping center of any other tenant;

2. prohibits the admission into a shopping center of any particular tenant or class of tenants, including for purposes of illustration:
   (a) other department stores,
   (b) junior department stores,
   (c) discount stores, or
   (d) catalogue stores;

3. limits the types or brands of merchandise or services which any other tenant in a shopping center may offer for sale;

4. specifies that any other tenant in a shopping center shall or shall not sell its merchandise or services at any particular price or within any range of prices;

5. grants respondent the right to approve or disapprove the location in a shopping center of any other tenant;

6. specifies or prohibits any type of advertising by any other tenant or grants respondent the right to approve or disapprove any advertising by any other tenant;

7. grants respondent the right to approve or disapprove the amount of floor space that any other tenant may occupy in a shopping center.

III

A. *It is further ordered*, That this order shall not prohibit respondent from including a provision in a reciprocal easement agreement or lease with respect to a shopping center which provision identifies in designated buildings respondent and those other major tenants which contemporaneously enter into such reciprocal easement agreement or lease with respect to such shopping center.

B. *It is further ordered*, That this order shall not prohibit respondent from negotiating to include, including, carrying out or enforcing an agreement or provision in any agreement which:

1. requires that with respect to the selection of other tenants in the shopping center, the developer shall select businesses which are financially sound and of good reputation.

2. requires that reasonable standards of appearance, signs, maintenance and housekeeping be maintained in a shopping center; or

3. establishes a layout of a shopping center which layout may (a) designate respondent's store, (b) set forth the location, size and height of all buildings, but not the amount of floor space that any other tenant may occupy in the shopping center, and (c) locate parking areas, roadways, utilities, entrances, exits, walkways, malls, landscaped areas and other areas.

IV

It is further ordered, That respondent shall:

A. within thirty (30) days after service of this order upon respondent, distribute a copy of this order to each of its operating divisions;

B. within thirty (30) days after service of this order upon respondent, notify each developer of shopping centers in which respondent is a tenant, of this Order by providing each such developer with a copy thereof by registered certified mail;

C. within sixty (60) days after service of this order upon respondent, file with the Commission a report showing the manner and form in which it has complied and is complying with each and every specific provision of this order; and

D. notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

Complaint in this matter issued on May 8, 1972. Respondents were the partnership which developed the Tysons Corner Regional Shopping Center ("Tysons Corner Center"), and the three major department store tenants of the center, City Stores Company ("City Stores"), The May Department Stores Company ("May Company"), and Woodward and Lothrop, Inc. ("Woodward"). The complaint charged that respondents had individually and in concert caused the inclusion or enforcement of certain provisions in leases of space at Tysons Corner Center which had the tendency to restrain trade, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45). These lease provisions included clauses granting the department stores broad rights to approve (or reject) prospective tenants to whom the developer might wish to rent space in the center, and clauses limiting the floor space which competitors of the lessees could occupy.

Respondents all filed answers conceding the existence of the challenged lease provisions but denying any illegality and raising various affirmative defenses. Following pretrial proceedings the matter was withdrawn from adjudication, and on June 26, 1974, the Commission accepted consent agreements entered by the Tysons Corner partnership, May Company, and Woodward. The matter was returned to adjudication with respect to City Stores, and was subsequently tried before an administrative law judge on a stipulated record.[1]

In an initial decision dated Oct. 30, 1974, Administrative Law Judge Needelman concluded that the acts and practices challenged in the complaint were "in commerce" as defined in the Federal Trade Commission Act, and that respondent had violated Section 5 by including and enforcing provisions in its lease which had the tendency and effect of eliminating price competition in a very significant retail center in the Wash., D.C. metropolitan area. The law judge also found that respondent had caused the inclusion or enforcement of lease provisions at the Tysons Corner Center "relating to size of competing department stores and satellite stores which has the tendency and effect of eliminating or restraining competition between respondent and other stores." (I.D. p. 48 [p. 999, herein])[2] The judge entered an order based on his finding of violations.

Respondent has appealed, contending that the challenged acts and practices were not "in commerce"[3] and that even if "in commerce" its challenged activities were not in any event violative of Section 5. Complaint counsel, while not appealing from the determination of the administrative law judge (being, presumably, satisified with the order he proposed) have nonetheless, in defense of the result reached by the judge, suggested further alternative grounds, rejected by him, which they contend would sustain the finding of illegality.

The facts of this matter are set forth adequately in the initial decision, and need only be summarized here. City Stores, through its Lansburgh's division, began doing business via operation of a department store at Tysons Corner Center in 1969 (I.D. 7). To obtain its lease at the center, City Stores was forced to sue the developer for specific performance, alleging that a one-page letter it had received during the early stages of the center's planning constituted an enforceable option (I.D. 41, 44). In order to demonstrate to the court that the one-page letter was indeed an agreement capable of specific performance, City Stores chose to ask that it be granted a lease essentially identical to those previously obtained by May Company and Woodward, also major department store tenants of the center (I.D. 47). The May Company and Woodward leases contained the challenged approval provisions. The District Court granted City Stores' prayer for specific performance (I.D. 48). Thereupon, City Stores entered into limited negotiations with the developer, wherein the parties made certain minor modifications in the lease (I.D. 48). The Court of Appeals subsequently affirmed the order of the District Court, approving the format of the City Stores' lease and ordering its implementation (I.D. 50). Thereupon, on May 23, 1968, the lease was executed in Maryland. Neither the District Court nor the Court of Appeals ever considered the antitrust implications of the lease (I.D. 50).

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[1] Of three counts in the original complaint, only Count II was adjudicated. This count challenged City Stores' inclusion or enforcement of the disputed contract provisions. Count I, alleging conspiracy among the parties to include and enforce an approval clause, was dropped as to City Stores by order of the administrative law judge on Feb. 21, 1973, without objection from complaint counsel. Count III dealt only with the actions of the Tysons Corner partnership.

[2] The following abbreviations are used herein: I.D. - Initial Decision (Finding No.) I.D. p. - Initial Decision (Page No.) RB - Respondent's Appeal Brief to the Commission (Page No.) Stip. - Joint Stipulation of the Parties

[3] The scope of Section 5 has since been extended to cover acts "in and affecting commerce." The earlier version, however, must govern the disposition of this case.

The "approval rights" challenged by the complaint were contained in Section 31.3 of City Stores' lease. This section provided, in relevant part, that with respect to all leases entered into by the developer for floor space in the shopping center:

> (A) No Center lease shall be entered into with any person(s) in respect of the Mall Stores * * * located within one hundred twenty-five (125) feet of the Enclosed Mall facades of the Tenant Principal Building, unless Tenant shall have previously approved the identity and location of the Person(s) as proposed Occupant(s), which approval, as respects identity, shall be granted or withheld in the sole and absolute judgment of Tenant and which approval, as respects location, shall not be unreasonably withheld* * *.
>
> (B) As respects any building, buildings and/or improvements or any part or parts thereof or any storeroom or storerooms therein located more than one hundred twenty-five (125) feet from the Enclosed Mall facade(s) of the Tenant Principal Building, all Center Leases entered into for the occupancy of thirty thousand (30,000) square feet or less of Floor Area shall be subject to the previous approval of Tenant of the identity of the Person(s), which approval shall not be unreasonably withheld* * *.
>
> (D) No Center Lease shall be entered with any Person(s) providing for the occupancy of more than thirty thousand (30,000) square feet of Floor Area without the prior consent of Tenant, which consent may be granted or withheld in the sole and absolute discretion of Tenant* * *.

The anticompetitive possibilities created by approval rights of the breadth obtained by City Stores are substantial. The quoted clauses confer upon it the power to exclude would-be entrants for any reason whatsoever, including the fact that such entrants may compete with respondent in some line of commerce on the basis of price or other factors.[4] Broad approval rights may also be used to condition the entry of a competitor upon adoption of suitable pricing policies.[5] And, because supplements, modifications, and renewals of satellite tenant leases required the re-approval of City Stores (I.D. 34), the approval clauses conferred upon it power to govern at least certain activities of existing competitors who had already been once approved.[6] In this regard it is worthwhile to note that most satellite tenant leases in the Tysons Corner Center contained clauses prohibiting conduct of discount operations by the tenant (I.D. 28).

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[4] By terms, the right to exclude competitors occupying over 30,000 square feet, or occupying space within 125 feet of respondent's principal mall facade is absolute. Approval of parties occupying under 30,000 square feet more than 125 feet from the mall facade may not be "unreasonably withheld." The meaning of "unreasonably" in the context of the lease is unclear, but there has been no suggestion made that it would prevent exclusion because of the competition offered by an entrant.

[5] There is abundant evidence in the record of this case to suggest that competitors were willing to alter their pricing policies in order to obtain entry into the Tysons Corner Center. (I.D. 21, 24, 28).

Respondent appears to recognize that had it actually vetoed a competitor simply to avoid competition, or had it insisted that a competitor temper its pricing policies as a condition of entry, there would be no question of illegality. It contends, however, that having never actually disapproved of a prospective tenant, it should not be held in violation for mere acquisition and possession of the right to do so.

The administrative law judge found, however, that the approval clauses exerted an anticompetitive effect in that they acted as a "signal to both the developer and would-be discounter entrants that approval may be withheld unless the discounter image is changed, and therefore, entry should be sought on the basis that price competition will be held in check." (I.D. p. 34.[pp. 990-991 herein]) The judge based this conclusion principally on the so-called "Dalmo" incident. A well-known Washington discount chain ("Dalmo Sales Co.") sought entry into Tysons Corner Center. By letter dated February 21, 1969, the developer sought approval of City Stores, pursuant to Section 31.3 of its lease, for the entry of Dalmo (under the name "Tyco Appliances"). The request letter pointed out that the lease to be signed by Dalmo would contain provisions prohibiting Tyco and Dalmo from advertising discount or bargain sales at all of their existing stores, and further noted that Dalmo stores were in the process of "removing their 'discount slogan' from all advertising, signing, etc." (I.D. 21). City Stores did not reply to the request for approval, and pursuant to the lease was thereby deemed to have approved the application (I.D. 22). Dalmo did not enter, however, because May Company and Woodward vetoed it (I.D. 23).[7]

Dalmo subsequently sued to obtain entry into the Tysons Corner Center. Its suit for a preliminary injunction was denied, but the findings of the District Court are instructive with respect to the possible effects of approval rights on the behavior of the developer. The court found that:

> Dalmo commenced negotiations with Tysons Corner in May, 1968. In December, 1968,

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[6] Section 31.5(a)(2) of the lease provided that approval, once given, may be revoked if the satellite tenant engages in "business operations or merchandising practices" which respondent determined are detrimental to the shopping center (I.D. 34).

[7] A short time later City Stores was asked to approve the entry of Sun Radio, another well-known Washington area discounter. City Stores granted its approval by letter. The Sun Radio lease contained an addendum in which Sun agreed to use no discount advertising at Tysons Corner, and to eliminate other discount signs throughout the Washington area as the time came for replacement of such signs (I.D. 24).

> Tysons Corner submitted a form lease with an addendum to Dalmo. Subsequent negotiations between Tysons Corner and Dalmo concerned the removal of the word "discount" from all Dalmo advertising. Representatives of Tysons Corner viewed Dalmo as somewhat below the quality of other stores at Tysons Corner and stated that changes in Dalmo's advertising policy might render it acceptable to the three department stores. Tysons Corner submitted to Dalmo an addendum containing such changes* * *. [*Dalmo Sales Co.* v. *Tysons Corner Regional Shopping Center*, 308 F.Supp. 988, 991 (D.D.C. 1970); *aff'd* 429 F.2d 206 (D.C. Cir. 1970).]

The "changes" to which the District Court referred related primarily to the use of discount advertising by Dalmo. The point, as the administrative law judge recognized, is not that City Stores (or the other major tenants) actively intervened in these negotiations in an effort to influence Dalmo's pricing policies. There is no evidence of record to this effect, and the District Court expressly found that it was not unlikely that defendants in the injunctive action would be able to prove that they had vetoed Dalmo for reasons unrelated to its pricing policies. The relevant point is that the developer apparently felt constrained to evaluate the pricing policies of a potential entrant into the Tysons Corner Center with reference to whether or not they would please the entrant's major tenant competitors, who retained the unfettered contractual right to veto the entrant if such pricing policies did not please them.

Under these circumstances we believe the administrative law judge was fully warranted in concluding that the approval rights obtained by City Stores may have highly adverse effects on competition, and especially price competition, and were exercised in such a way as to threaten if not achieve this effect. The administrative law judge went further to consider the economic setting: Tysons Corner Center is a significant center of business, in which a restraint of trade would affect a significant number of consumers (I.D. pp. 40-41 [p. 994, herein]). Reviewing the underlying policy of the antitrust laws, the judge reasoned that the approval clauses come close to accomplishing indirectly what all agree could not be done directly: contractual control by a party over the pricing policies of its competitors (I.D. pp. 41-42 [pp. 994-995, herein]). The administrative law judge thus concluded that complaint counsel had made out a *prima facie* case under Section 5 demonstrating that the approval clauses constituted an unreasonable restraint of trade. Because City Stores did not come forth with evidence to demonstrate a business justification for the approval rights contained in its lease, the law judge concluded that it had violated Section 5.

On appeal, City Stores asserts by way of "justification" only its felt necessity to request from the District Court a lease identical to those negotiated by May Company and Woodward. We believe these "chaste circumstances" of its lease acquisition, outlined hereinabove and in I.D. 41-54, are of no relevance to the question of liability under Section 5. City Stores knew, prior to requesting it, that the lease it sought from the District Court included the provisions in question. It had the opportunity to request a lease without such provisions.[8] Indeed, in ironing out lease terms prior to the District Court's final decree, City Stores waived inclusion of at least one lease right it did not need in order to avoid a reciprocal liability. (I.D. 48; Stip. 21) It could similarly have waived inclusion of the approval rights. Its acquisition of the challenged lease provisions was in no sense, therefore, "involuntary."[9] The fact that May Company and Woodward had previously included the disputed provisions in their leases could not possibly justify City Stores' inclusion of the same provisions, if those provisions were otherwise illegal.[10] Nor do we see how approval of the trial and appellate courts, which gave no consideration of any sort to the antitrust implications of the City Stores' lease, can possibly immunize that agreement from Commission scrutiny.

We thus do not quarrel with the administrative law judge's rationale for finding respondent's approval rights to be illegal, and adopt it as a suitable basis for our own resolution of this controversy. We believe, in addition, however, that the spirit of the antitrust laws and our mandate under Section 5 of the Federal Trade Commission Act to prevent restraints of trade in their incipiency [*Federal Trade Commission* v. *Brown Shoe Co.*, 384 U.S. 316, 322 (1966); *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-395 (1953)] compel the further conclusion that agreements which create approval rights as broad and unfettered as those involved in this case are illegal *per se*.

The existence of approval rights of the sort involved here creates the imminent danger of impermissible, traditionally proscribed and *per se* illegal anticompetitive harm. The approval rights obtained by City Stores were essentially without limitation. They allowed it to exclude competitors for whatever reason it wished, including the fact that it feared competition and the prices competitors might charge. The use of these approval clauses to foreclose price competition, either via the concerted exclusion of a discounting competitor, or by conditioning entry of a competitor upon adoption of certain pricing policies, would amount to an agreement to fix prices, long held to be illegal *per se* under the antitrust laws, without regard to whatever justification might be raised on behalf of the necessity to maintain certain price levels at a shopping center. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-23 (1940); *Dr. Miles Medical Co.* v. *John D. Park [Sons Co.*, 220 U.S. 373 (1911); *Girardi* v. *Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963).

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[8] I.D. 47-48. The law judge found that City Stores was advised shortly before filing its action for specific performance that the May Company and Woodward leases contained broad approval rights. It became aware of the precise details of these leases well after the initiation of litigation, but before the details of relief were finally determined.

[9] And even the involuntary acquisition of illegal contractual rights cannot excuse subsequent voluntary retention of them. At no time did City Stores ever waive its rights of approval. (I.D. 49)

[10] The Commission, of course, did challenge the legality of the clauses negotiated by May and Woodward, which City Stores copied. As to those parties the matter was settled by consent, without an admission of wrongdoing.

And even should the lessee refrain from overt enforcement of the approval clause in an anticompetitive fashion, there is always the further danger, suggested by the record in this case, and by common sense as well, that the developer will feel compelled to act with an eye out for the tenant's undisputed, contractual authority to veto an unwanted competitor, excluding altogether or limiting the pricing flexibility of a would-be entrant.

It seems to us, moreover, that random exclusion of potential entrants by lessor and lessee, pursuant to exercise of a blanket right of approval, offends the policy of the antitrust laws which render group boycotts illegal *per se*. *Klor's Inc.* v. *Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959). Counsel for respondent and the administrative law judge attempt to distinguish the *Klor's* case on grounds that it involved an agreement between ten suppliers and a competitor of Klor's. Exclusion pursuant to an approval clause would amount to a concerted refusal to deal only on the part of one competitor (the tenant) and one supplier (the lessor). Complaint counsel argue that this difference is not determinative, and that the spirit of the boycott laws abhors the concerted exclusionary activity by competitor and supplier that would result from the veto of a tenant pursuant to an approval clause.

Cases enunciating the rule that joint refusals to deal are illegal *per se* have in fact generally involved two or more parties at the same distributional level [*e.g., Klor's Inc., supra; Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457 (1941); *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966)]. It is by no means clear, however, that such cases have turned on the presence of more than one party at the same distributional level. As the Supreme Court summarized in *General Motors, supra:*

> The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. [Citations omitted] * * * Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins* * * (at p. 146)

Exclusion of an entrant from a shopping center pursuant to exercise of blanket veto authority amounts to no more or less than joint activity (on the part of tenant and lessor) to deprive the potential entrant of a source of supply. This combination was an important focus of the Court's concern in *Klor's*, and we question whether the case would have been decided differently had the allegation been that Broadway Hale signed separate, unrelated agreements with each of Klor's suppliers, or, for that matter, had Klor's been dependent on only one major supplier which agreed with Broadway Hale to cut it off. Cf. *Girardi* v. *Gates Rubber Co. Sales Division, Inc., supra*, at page 200, (citing Klor's in a situation involving concerted action by one supplier and one competitor, although the case turns on an allegation of price fixing).

City Stores suggests that agreements between a supplier and a distributor cannot constitute boycotts because that is tantamount to holding that exclusive dealing arrangements are *per se* illegal, which they are not. Courts have routinely scrutinized exclusive dealing agreements, unlike boycotts, for their economic effect.

While the line between the two is far from clear, it is apparent that by its terms an approval clause is not an exclusive dealing agreement, but merely a grant to the tenant to exclude at random those competitors it may choose.[11] The fact that City Stores *might* under appropriate circumstances, and with a showing of suitable economic purpose and insubstantial competitive harm be able to obtain rights of exclusive occupancy from a lessor obviously does not give it all "lesser included" privileges. The merchant with an exclusive distributorship cannot lawfully agree to admit a second distributor on condition that the new entrant charge the same prices, arguing that the right to exclude everyone must include the right to admit some on condition. The same is true, we believe, with respect to blanket approval powers.

There are, to be sure, concerns of existing tenants regarding the continuing operation of a shopping center which we can imagine a developer would quite properly take into account in evaluating potential new entrants into the retailing community. Moreover, we recognize, as did the administrative law judge, that it may be appropriate for a tenant, contemplating a long term rental commitment, to insist that its concerns be accommodated by including a continuing obligation upon the landlord to consider them in the tenant's lease. But the pricing policies and ability to offer competition of prospective entrants are clearly not concerns to which the antitrust laws allow concerted attention of tenant and developer to be paid. And similarly, the law frowns upon the concerted exclusion of prospective entrants pursuant to no standards save the unarticulated wishes of a competitor. Thus, while the administrative law judge sought "justification" evidence from respondent (but did not receive it), it seems to us that insofar as the approval clauses involved here do confer blanket power to exclude competitors, and exercise control over their pricing, there is no justification which could, under long established precedent, be properly advanced for them.

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[11] The District of Columbia Court of Appeals was faced with this dilemma in *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957). In that case an automobile manufacturer's major distributor requested an exclusive dealing agreement, the granting of which had the effect of eliminating Webster as a distributor. Apparently in response to the contention that the joint exclusion of a competitor constituted a boycott the court noted simply, "The fact that any other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement." (At p. 421). The form of the agreement clearly makes a substantial difference. The court recognized that an agreement to create an exclusive dealership, though it unavoidably results in an exclusionary result, may nonetheless have redeeming competitive virtues. The same recognition has not been accorded to agreements which have as their main purpose and effect the random exclusion of particular competitors, pursuant to no articulated standards.

Moreover, we believe, and no reason has been presented to the contrary, that leases can readily be written in such fashion as to spell out the specific and legitimate considerations which a tenant may insist that developers consider in admitting new entrants[12], without creating the massive potential for price-fixing and anticompetitive exclusionary activity inherent in agreements conferring blanket approval rights.

For these reasons, because the agreement itself creates the imminent danger of impermissible, traditionally proscribed and *per se* illegal anticompetitive harm, and because arguably legitimate business objectives which may be served by the agreement can be achieved by means of substantially less restrictive contractual arrangements, we believe the agreement must be condemned, and the contract reformed.[13]

City Stores protests that it is being cited for the mere possession of unexercised market power.[14] There is a significant difference, however, between the contract at issue in this case and the unexercised power to restrain trade inuring to a firm which has gained a large market through internal expansion. In the latter case (absent anticompetitive motive or other unusual circumstance) the firm grows large in response to business imperatives, in particular, demand for its product. Corporate growth as the result of vigorous, lawful competition is the essence of our free enterprise system, and merely because such growth may incidentally confer power to injure competition cannot be a reason to discourage or undo it, absent abuse or evidence of injury. This case, to the contrary, does not involve a unilateral corporate response to market forces, redounding to the benefit of consumers. Respondent can show no justification for its actions in contracting for and retaining rights as broad as those it acquired. Whatever legitimate purposes might have been served by the approval clauses (and City Stores has suggested none, insisting throughout these proceedings that it had essentially no interest in them) could as readily have been accomplished by less drastic means.

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[12] Indeed, paragraph 31(C) of the City Stores' lease includes an enumeration of specific factors:

"(C) Landlord agrees that in respect of the selection and location of Occupants on the Shopping Center Site, the following objectives, *inter alia*, shall be considered * * * (a) having financially sound Person(s) of good reputation as Occupant(s) of the Shopping Center Site, (b) maintaining a balanced and diversified grouping of retail stores, (c) establishing and maintaining a proper mixture of retail stores and a diversified selection of merchandise, and (d) avoiding excessive and persistent traffic congestion in the Common Area."

[13] Both the Commission and courts have on many occasions in the past recognized the necessity to amend contracts and agreements, though unenforced, with the potential or actual effect of restraining trade. *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 458 (1922); *United States* v. *International Salt Co.*, 6 F.R.D. 302, 309 (S.D.N.Y. 1946); *Northern Pacific Railway Co.* v. *U.S.*, 356 U.S. 1, 11-12 (1958).

[14] The administrative law judge, as noted before, did not find that City Stores' approval rights were wholly unexercised, nor do we, but for the purposes of our alternative holding we do assume, *arguendo*, that they were.

We think a better analogy than the corporation grown large is that of the man who acquires a machine gun, arguing that he intends to use it only in self defense. While heavy armaments can doubtless be used for this purpose, so can many less dangerous weapons, and laws properly forbid the acquisition and possession of machine guns without waiting for a calamity. We believe that Section 5 is no less capable of dealing with the competitive machine gun of limitless approval rights, and that the threat they pose to traditional antitrust values warrants respondent's confinement to a more modest arsenal.

Floor Space Limitations

Language in City Stores' lease prescribed that May Company and Woodward could not occupy more than 245,000 square feet of floor space in the Tysons Corner Center. The Woodward and May Company leases each contained similar clauses, limiting the size of the non-party major tenants to 245,000 square feet (I.D. 36). The administrative law judge further found that City Stores' lease imposed space limitations on many prospective satellite tenants, by conditioning approval for their admission on their observance of strict space restrictions (I.D. 40). Identical limitations were also imposed by the May Company and Woodward leases.

We agree with the conclusion of the administrative law judge that these agreements to limit the size of competitors violate Section 5 (I.D. p. 47 [p. 998, herein]). It is almost self-evident, and the administrative law judge so found, that floor space is a crucial element in the ability of a store to compete (I.D. 6, 37-39). The inability to expand beyond a certain size can effectively preclude a retailer from offering a particular product line or services that would render it a more viable competitor for consumers' patronage. In demonstrating an agreement with the developer to limit the size of competitors, we thus believe that complaint counsel made out a *prima facie* case of an unreasonable restraint of trade, activity with a clear tendency and capacity to limit competition.

Respondent has suggested no justification for these limitations save the statement that "There are physical limitations to a shopping center, and there must be a size beyond which the major tenants should be prohibited from expanding." (RB 52) While the overall size of a shopping center, in relation to available land and facilities, may be a legitimate concern of a major shopping center tenant, cognizable in its lease, we are hard put to see how limitations placed on particular competitors are the least restrictive or even a reasonably related way to achieve that result.

City Stores indicated that it required a limitation on the floor space of May Company and Woodward because those companies had obtained lease provisions limiting its available space. As was observed with respect to approval clauses, restraints imposed by competitors cannot justify the adoption of the same restraints by those who may be victimized thereby. The Commission did challenge the restrictions on City Stores' size imposed by May Company and Woodward, and by consent those companies agreed to eliminate them.

Respondent also suggests that by virtue of leases executed prior to its own, the May Company and Woodward had already limited each others' maximum size, as well as that of other shopping center tenants and, therefore, City Stores' lease agreement could have no further tendency to restrain trade. It seems to us, however, that from the moment City Stores first executed its lease, the restrictive provisions therein had as great a capacity to restrain trade as those contained in the leases of the other department stores. The existence of *both* the City Stores' lease and the Woodward lease stood as equally effective barriers to the expansion of May Company (and vice versa) and the existence of all three major department store leases independently and to identical effect limited the sizes of certain satellite tenants.

Finally, in its reply brief, at pages 18-19, City Stores argues that order paragraph III(B)(3) proposed by the administrative law judge undermines his rationale for finding liability, in that it permits respondent to incorporate in a lease a shopping center layout which may designate the location, size, and height of all buildings (but not the amount of floor space that any tenant may occupy). We see no inconsistency in the law judge's conclusions and his order. Paragraph III(B)(3) of the order merely makes clear that a shopping center layout will not constitute a limitation on floor space, which is prohibited by Section II of the order. It is readily conceivable that, as a major tenant, City Stores would have a substantial interest in knowing the general layout of a center into which it is contemplating entry in order to ensure itself, for instance, that the center contains a minimum viable mix of stores, and that access to its own store, visibility from the road, and the like, will not be impeded. The order of the administrative law judge merely seeks to assure that a less restrictive means of satisfying potentially important business interests will not be deemed to run afoul of the general prohibition on those restraints for which no justification appears.[15]

Commerce

Respondent contends that the practices challenged by the complaint were not "in commerce." The administrative law judge found that they were. We agree. That the challenged convenants in this case were embodied in a lease of realty interest, often considered to be local in character, does not end the analysis. A two-hundred page agreement, signed by a multi-State corporation, governing all facets of the operation of a major retail center designed to sell to the citizens of three jurisdictions merchandise received from all parts of the country is not exempted in its entirety from interstate commerce, or immunized from antitrust scrutiny merely because it takes the form of a lease of real property.[16]

The administrative law judge based his conclusions that the challenged practices were in interstate commerce on the variety of interstate aspects of City Stores' acquisition and exercise of its approval rights (I.D. pp. 28-31 [pp. 985-988, herein]). We have no quarrel with the law judge's analysis, which dealt both with the agreement whereby City Stores obtained its approval rights, and with the subsequent means by which those rights were implemented, which included communications by mail across State lines. We would simply add that in our view a consideration of both the circumstances in which the challenged agreement was executed, and a consideration of its subject matter, lead to the conclusion that the agreement alone, or the acquisition by City Stores of the challenged approval rights, occurred in commerce.

The parties to the agreement were a corporation headquartered in New York with operations throughout the country, (I.D. 1,2) and a developer headquartered in Maryland (I.D. 8). City Stores signed the lease on behalf of its Lansburgh's division, headquartered in Wash., D.C. (I.D. 3). The agreement was executed in Maryland (I.D. 50), and applied to the conduct of business at a shopping center located in Virginia (I.D. 17). If these facts are not sufficient to establish that City

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[15] Presumably the administrative law judge included the layout provision because an identical provision was included in the consent orders signed by Woodward and the May Company in this matter. While the order may be surplussage, in that what it permits is not forbidden by the prohibition on floor area restraints, City Stores has not argued that, as a means of resolving the conflict, the provision be dropped.

[16] To cite a clear example, the leases of many satellite tenants at Tysons Corner Center contained provisions which prevented them from using discount advertising or adopting a discount pricing approach in their business. We know of no principle of law which holds that because a price-fixing agreement is inserted in a lease of real property it therefore cannot be of interstate character. In this regard the covenants of a lease must be analyzed in the same manner as any agreement. The fact that certain undertakings contained in leases of real property may be in commerce, or may affect commerce, for the purposes of antitrust jurisdiction, need not alter the applicability of state and local law to those portions of the lease which do not restrain trade in commerce.

Stores' acquisition of the challenged approval rights occurred in interstate commerce, we are hard put to discern in which particular state the transaction did occur; in New York, the corporate headquarters and center of control where the decision was presumably made to seek the contract known to contain the challenged provisions; in Maryland, where the lease was signed; or in Virginia, the site of the shopping center to which the lease applied?

Moreover, the agreement on its face applied to the conduct of business at Tysons Corner Center, conferring upon City Stores authority to determine who could or could not sell there (and limiting the size of City Stores' competitors). There is no question that the sale of certain merchandise at Tysons Corner Center occurs in interstate commerce. The center is located in Virginia, on an interstate beltway, nine miles from the center of the District of Columbia (I.D. 9). Advertising occurs in media of interstate circulation and consumers cross state boundaries from the District of Columbia and Maryland to make purchases at the center. Merchandise is also shipped for home delivery from the center to consumers in various states. Commission jurisdiction over sales practices at the center would clearly attach (I.D. 7, 17). See *Safeway Stores, Inc.* v. *FTC*, 366 F.2d 795-8 (9th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967); *Dahnke Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921). It would be anomalous to hold that the making of an agreement which is intended to govern commercial activities clearly in commerce is not itself in commerce simply because it occurs in a lease of realty. Both the interstate aspects of the contracting process whereby approval rights were obtained, and the intended applicability of such rights to activities clearly in interstate commerce, compel a conclusion that the agreement was "in commerce."[17]

Order

As prescribed by §3.52(b)(5) of the Commission's Rules of Practice, respondent has submitted alternative order language to that proposed by the administrative law judge, assuming, *arguendo*, that the Commission finds (as it has) a violation. We agree generally with the approach followed by the administrative law judge in fashioning his order. The judge's order essentially prohibits respondent's acquisition of broad approval rights, as well as its use of certain other types of restrictive contractual provisions which could be used to accomplish the same anticompetitive ends as the approval clauses (*i.e.*, no-discounter clauses; merchandise limitations, advertising restrictions, restrictions on categories of stores). We believe the provision of Part II of the law judge's order are suitably tailored to the violation, and are necessary to prevent its recurrence in the same or a different guise.[18]

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[17] Adoption of respondent's theory would render it virtually impossible for the Commission to halt a conspiracy to fix prices, no matter how grandiose its designs. The conspirators need merely take care to consummate their agreement within the boundaries of one state, rather than via phone or mail. Although admitting that an agreement to fix prices is illegal *per se*, without regard to actual effect, respondent would presumably contend that no matter from whence the parties to the agreement had come, and no matter how many states their agreement might encompass, the "agreement" itself was not in commerce. While the term "in commerce" did have certain limitations, recognized by Congress when it recently enlarged the scope of Section 5, we cannot believe that it ever contained such a large loophole, nor have courts thought so, in upholding Commission orders directed at prevention of agreements to restrain commerce. See, *e.g.*, *Salt Producers Ass'n, et al.* v. *Federal Trade Commission*, 134 F.2d 354, 359-60 (7th Cir. 1943).

At the same time, while insuring that restrictive leasing provisions may not be used to control prices and stifle competition, the administrative law judge recognized that there well may be (though respondent has not suggested what they are) various legally cognizable interests of a shopping center tenant in the character of other center tenants, interests which are quite permissibly embodied in a lease. These interests cannot, of course, be accommodated by the blunderbuss mechanism of the approval clause. They must be formulated precisely and explicitly, so that exclusion of prospective tenants by the developer occurs pursuant to well-defined standards that are unlikely to constitute a cover for price fixing and other price controlling activities. In Section III of his order, the administrative law judge, therefore, indicated that respondent was not precluded from negotiating for a lease with the developer that required the lessor to select businesses which are financially sound and of good reputation, nor from negotiating a lease requiring that reasonable standards of appearance, signs, maintenance, and housekeeping be maintained in the shopping center.

Respondent also implies that if the Commission will not adopt its alternative prohibitory language in paragraph II of the order, the Commission should include in paragraph III a provision also contained in the consent orders negotiated with May Company and Woodward, allowing lease clauses which require the developer of a shopping center to consider the objective of maintaining a balanced and diversified grouping of retail stores, merchandise, and services. We think that inclusion of this clause in Section III of the order is appropriate.[19] The administrative law judge expressed concern in his decision that the term "balance" could be used as a subterfuge for eliminating discounters who might well be deemed to upset the balance of a shopping center. We do not think that this is a likely possibility. Part II of the order makes clear that pricing orientation of a particular center entrant is not a valid criterion of selection under any circumstances. Moreover, the tenant who seeks to exclude an entrant pursuant to a "balance" clause is in an entirely different posture from one with an absolute right of approval. In the latter case the tenant may disapprove and the entrant must sue to prove that exclusion was unlawful, if indeed the case ever reaches that point (the developer may simply exclude the entrant in anticipation of a veto). Where criteria for entry are explicitly set forth in the lease, the final decision is solely in the hands of the landlord; should the entrant be admitted the burden is upon the tenant to demonstrate that the landlord did not consider the requisite balance and diversification, a showing unlikely to be made or even attempted if pricing policy is the main reason for objection to the new competitor.

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[18] We believe, moreover, despite respondent's objections, that it is necessary that the order apply to exclusionary policies affecting all tenants, satellite or major. While the evidence relied upon by the administrative law judge concerned satellite tenants, this was clearly incidental to the violation in this case; City Stores' approval clause gave it the authority to exclude and control the policies of large as well as small entrants into Tysons Corner Center.

[19] It should be noted, however, that Section III of the order is intended to clarify, rather than create exceptions to, the prohibitions contained in Section II. It is not, that is, intended to constitute an exhaustive listing of the factors which City Stores may insist be considered by a shopping center landlord in the management of the center, as a condition of City Stores' signing a shopping center lease. This proceeding has not been concerned with these matters.

Respondent also suggests that the Commission should include a proviso in its order similar to those in the May Company and Woodward consent orders, specifying that it may negotiate a lease clause which prevents the developer from leasing nearby mall space to a tenant whose presence would create undue noise, litter, or odor. For the same reasons indicated in the preceding paragraph we believe inclusion of this provision is proper.

As modified, we believe that the order herein entered adequately addresses the violation in this case. It prohibits the use of overbroad anticompetitive lease clauses, while making clear that respondent remains free to bargain with its lessor for lease language which accommodates legitimate interests it may have in the continuing operation of a shopping center.

An appropriate order is appended.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent's counsel from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion, having denied the appeal:

It is ordered, That the initial decision of the administrative law judge, pages 1-51, [pp. 970-1001], herein, be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, with the exclusion of page 38 [p. 993, herein] and all of footnote 42, [p. 993, herein], and except insofar as certain comments on pages 49-50 [pp. 999-1000 herein] are inconsistent with the conclusions on pages 19-20 [pp. 1016-1017, herein] of the accompanying Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order be entered:

ORDER

I

For purposes of this order the following definitions shall apply:

A. The term "respondent" refers to City Stores Company, its operating divisions, its subsidiaries, and their respective officers, agents, representatives, employees, successors or assignees.

B. The term "shopping center" refers to a group of retail outlets in the United States of America planned, developed and managed as a unit and containing (1) a total floor area designed for retail occupancy of 200,000 square feet or more, of which at least 50,000 square feet is for occupancy by tenants other than respondent; (2) at least two tenants other than respondent; (3) at least one major tenant; and (4) on-site parking.

C. The term "tenant" refers to any occupant or potential occupant of retail space in a shopping center which occupancy is for sale of merchandise or services to the public, whether said occupant leases or owns said space, but the term does not refer to an occupant of space within the store occupied by respondent, which occupant operates a department for respondent pursuant to a license from respondent.

D. The term "major tenant" refers to a tenant providing primary drawing power in a shopping center. A tenant which occupies at least 50,000 square feet of floor area will be deemed to provide primary drawing power.

II

It is ordered, That respondent, in its capacity as a tenant in a shopping center, cease and desist from obtaining, making, carrying out or enforcing, directly or indirectly, any agreement or provision of any agreement, whether applicable to the shopping center or to any expansion thereof, which:

1. grants respondent the right to approve or disapprove the entry into a shopping center of any other tenant;

2. prohibits the admission into a shopping center of any particular tenant or class of tenants, including, for purposes of illustration:

   (a) other department stores,
   (b) junior department stores,
   (c) discount stores, or
   (d) catalogue stores;

3. limits the types or brands of merchandise or services which any other tenant in a shopping center may offer for sale;

4. specifies that any other tenant in a shopping center shall or shall not sell its merchanidse or services at any particular price or within any range of prices;

5. grants respondent the right to approve or disapprove the location in a shopping center of any other tenant;

6. specifies or prohibits any type of advertising by any other tenant or grants respondent the right to approve or disapprove any advertising by any other tenant;

7. grants respondent the right to approve or disapprove the amount of floor space that any other tenant may occupy in a shopping center.

III

A. *It is further ordered*, That this order shall not prohibit respondent from including a provision in a reciprocal easement agreement or lease with respect to a shopping center which provision identifies in designated buildings respondent and those other major tenants which contemporaneously enter into such reciprocal easement agreement or lease with respect to such shopping center.

B. *It is further ordered*, That this order shall not prohibit respondent from negotiating to include, including, carrying out or enforcing an agreement or provision in any agreement which:

1. requires that with respect to the selection of other tenants in the shopping center, the developer shall select businesses which are financially sound and of good reputation.

2. requires that reasonable standards of appearance, signs, maintenance, and housekeeping be maintained in a shopping center;

3. establishes a layout of a shopping center which layout may (a) designate respondent's store, (b) set forth the location, size and height of all buildings, but not the amount of floor space that any other tenant may occupy in the shopping center, and (c) locate parking areas, roadways, utilities, entrances, exits, walkways, malls, landscaped areas and other areas;

4. prohibits occupancy of space in a shopping center immediately proximate to respondent by types of tenants that create undue noise, litter or odor; or

5. requires that in respect of the selection of other tenants in the shopping center by the developer the objective of maintaining a balanced and diversified grouping of retail stores, merchandise, and services shall be considered.

IV

It is further ordered, That respondent shall:

* A. within thirty (30) days after this order becomes final, distribute a copy of this order to each of its operating divisions;

* B. within thirty (30) days after this order becomes final, notify each developer of shopping centers, in which respondent is a tenant, of this order by providing each such developer with a copy thereof by registered certified mail;

* C. within sixty (60) days after this order becomes final, file with the Commission a report showing the manner and form in which it has complied and is complying with each and every specific provision of this order; and

D. notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

In the Matter of

HORIZON CORPORATION

Docket 9017. Order, June 10, 1975

General counsel ordered to take action to notify the Arizona District Court in accordance with Commission's determination contained in its order.

Appearances

For the Commission: *Eugene Kaplan, Alan N. Schlaifer* and *Morgan D. Hodgson.*

For the respondent: *Basil Mezines, Stein, Mitchell & Mezines,* Wash., D.C. and *Samuel Pruitt, Jr.* and *J. Michael Brennan, Gibson, Dunn & Crutcher,* Los Angeles, Calif.

Order Directing General Counsel to Take Appropriate Action in Judicial Proceeding

By motion filed May 12, 1975, complaint counsel requested that the General Counsel of the Commission be directed to appear as *amicus*

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* Commission order of July 29, 1975, corrected the statement of compliance deadlines in the final order by substituting the words "this Order becomes final," for the words "service of this Order upon respondents" in each of subparagraphs IV A., B., and C.

curiae in *O'Neil* v. *Horizon Corp.*, Docket No. 10427, an action now pending in the Arizona District Court in which, they contend, a proposed settlement may have some effect on the above-captioned matter. Respondent does not object to such an appearance by a representative of the Commission, but argues that it would violate the Administrative Procedure Act, 5 U.S.C. § 554(d), for the General Counsel, as the Commission's chief legal adviser, to perform the investigative and prosecutorial duties necessary to make the appearance. Pursuant to Section 3.22 of the Commission's Rules of Practice, the law judge certified this motion to the Commission.

The Commission has determined to grant the motion to the extent of notifying the court of 1) the pending Commission action against Horizon; 2) the authority of the Commission to seek consumer redress in court and the possibility that such authority might be exercised if a final cease and desist order were entered against Horizon; and 3) the effect of the proposed settlement in the *O'Neil* case on any future Commission consumer redress action. The Commission finds no impropriety in the General Counsel representing the Commission in this matter, since he will not be prosecuting the Commission's complaint within the meaning of 5 U.S.C. § 554(d) but will simply be informing the court of matters relevant to the court's consideration of the potential settlement in the *O'Neil* case.

It is ordered, That the General Counsel take action to notify the court in the *O'Neil* case in accordance with the above.

IN THE MATTER OF

CENTRAL CARPET CORPORATION, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8980. Complaint, July 8, 1974–Decision, June 12, 1975

Consent order requiring a Bradbury Heights, Md., seller, distributor and installer of carpeting and floor coverings, among other things to cease using bait and switch tactics and other deceptive selling practices.

Appearances

For the Commission: *Everette E. Thomas, Richard F. Kelly, M. McGill, Alice Kelleher, Alan L. Cohen.*

For the respondents: *Jeremiah D. Griesemer*, Wash., D. C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Central Carpet Corporation, Inc., a corporation, and James A. Taylor, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PAR. 1. Respondent Central Carpet Corporation, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business located at 4407 Southern Ave., Bradbury Heights, Md.

Respondent James A. Taylor is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business located in the State of Maryland, to purchasers thereof located in various other States in the United States and the District of Columbia, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor coverings, the respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations to prospective purchasers with respect to their products and services.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

$109
3 Rooms
NYLON PILE CARPET
Quality Wall to Wall

up to 270 sq. ft.

* * * * * * *

Free
38 Piece
Ovenware Set
When you purchase 3 rooms
of our Deluxe 501 Nylon Carpet
Call Now

* * * * * * *

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set forth herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing, directly or by implication, that:

1. Respondents are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements.
2. Purchasers of the said Dupont 501 Carpet receive a "free" 38-piece ovenware set.

PAR. 6. In truth and in fact:

1. Respondents' offers are not bona fide offers to sell carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of carpeting. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents' salesmen, who make no effort to sell to the prospective customer the advertised carpeting. Instead, they exhibit what they represent to be the advertised carpeting which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced carpeting or floor coverings of superior quality and texture are thereupon exhibited, which by comparison disparages and demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents' salesmen attempt to sell and frequently do sell the higher priced carpeting.
2. Purchasers of respondents' Dupont 501 Carpet do not receive a free 38-piece ovenware set. To the contrary, the cost of the "free" gift is added to and regularly included in the selling price of the merchandise sold to the customer.

Therefore, the statements and representations as set forth in

Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Six, above, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

Therefore, the acts and practices as set forth in Paragraph Seven hereof were and are unfair and false, misleading and deceptive acts and practices.

PAR. 8. In the further course and conduct of their aforesaid business, and in connection with the representations set forth in Paragraph Four above, respondents offer carpet with padding and installation included at a price based upon specified areas of coverage. In making such offer, respondents have failed to disclose the material fact that the prices stated for such specified areas of coverage are not applied at the same rate for additional quantities of carpet needed, but are priced substantially higher.

The aforesaid failure of the respondents to disclose said material facts to purchasers has the tendency and capacity to lead and induce a substantial number of such persons into the understanding and belief that the prices charged for quantities of carpet needed in excess of the specified areas of coverage will not be substantially higher than the rate indicated by the initial offer.

Therefore, respondents' failure to disclose such material facts was, and is, unfair, false, misleading and deceptive.

PAR. 9. In the further course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents use the term "up to 270 sq. ft." to indicate the quantity of carpeting available at the advertised price.

PAR. 10. The unit of measurement usually and customarily employed in the retail advertising of carpet is square yards. Consumers are accustomed to comparing the price of carpet in terms of price per square yard, therefore, respondents' use of the square foot unit of measurement confuses consumers who compare respondents' prices with competitors' prices advertised on a square yard basis.

Furthermore, respondents' use of square foot measurements exaggerates the size or quantity of carpeting being offered, and, therefore, has the capacity and tendency to mislead consumers into the mistaken belief they are being offered a greater quantity of carpet than is the fact.

Therefore, the acts and practices as set forth in Paragraph Nine hereof were and are unfair, false, misleading and deceptive.

PAR. 11. In the further course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and services of the same general kind and nature as those sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesiad, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY ALVIN L. BERMAN, ADMINISTRATIVE LAW JUDGE

APRIL 17, 1975

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this proceeding on July 8, 1974, charging respondents Central Carpet Corporation, Inc., a corporation, and James A. Taylor, individually and as an officer of said corporation, with having engaged in unfair and deceptive acts and practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

More specifically, respondents were charged with (1) having engaged in bait and switch tactics in the advertising and sale of carpeting, (2) falsely representing that customers would receive a "free" gift, (3) utilizing the aforesaid acts and practices to be able to induce a customer into signing a contract upon initial contact without giving him sufficient time to carefully consider the purchase and the consequences thereof, (4) failing to disclose the fact that advertised prices for stated areas of coverage are not applied to additional quantities required, but that the rates for such additional quantities are substantially higher and (5) offering carpeting for sale in terms of a price for a number of square feet, *e.g.*, "up to 270 sq. ft.," and so (a) confusing customers who attempt to compare respondents' prices with those of competitors who advertise on a square yard basis (the usual and customary unit of measurement employed in retail advertising of carpets) and (b) exaggerating the size or quantity of carpeting offered.

Respondents, who at the time were being represented *pro se* by James A. Taylor, were granted an extension of time for filing an answer to the complaint. Respondents filed their answer on Sept. 26, 1974, admitting the complaint in part but denying the allegations of violation.

After, on two separate occasions, allowing respondents additional time to respond to complaint counsel's request for admissions, hearings were scheduled to commence on Jan. 6, 1975. While respondents were in default in responding to the request for admissions, upon an appearance of counsel for respondents on Dec. 23, 1974, and upon motion of that counsel, a tardy response to the request for admissions was allowed to be filed and hearings were scheduled to commence on Jan. 20, 1975. Hearings were held on Jan. 20, 1975 through Jan. 23, 1975, at the conclusion of which the record was closed. Proposed findings were filed by the parties on Feb. 24, 1975, and respondents filed a reply on Mar. 12, 1975.

This initial decision is based on the record as a whole and upon a consideration of the demeanor of the witnesses who gave testimony in this proceeding. References to particular parts of the record are frequently cited as examples only. Proposed findings of fact and conclusions of law submitted by the parties have been given careful consideration and to the extent not included herein in the language proposed or in substance are rejected as not supported by the record or as immaterial or irrelevant.[1]

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[1] References to the record are set forth in parentheses, and certain abbreviations, set forth below, are used:

Ans. - Respondents' answer to the complaint.

RPF - Proposed findings of fact submitted by respondents, followed by the page being referenced.

RRB - Reply brief submitted by respondents, followed by page being referenced.

CX - Commission's exhibit, followed by number of exhibit being referenced.

RX - Respondents' exhibit, followed by number of exhibit being referenced.

RRA - Respondents' reply to request for admissions, followed by number of the reply being referenced.

Tr. - Official transcript of the formal hearings, followed by the page number being referenced and preceded by the name of the witness whose testimony is being referenced.

FINDINGS OF FACT

1. Respondent Central Carpet Corporation, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal place of business and office located at 4407 Southern Avenue, Bradbury Heights, Md. (RRA 1-6; Ans.; Taylor, Tr. 7).

2. Respondent James A. Taylor is an individual and an officer of the corporate respondent Central Carpet Corporation, Inc. His business address is the same as that of the corporate respondent. Mr. Taylor is the president and sole shareholder of Central Carpet Corporation, Inc. He formulates, directs and controls the acts and practices of the corporate respondent and has at all times done so. He formulated, directed and controlled the acts and practices of Central Carpet Company, the predecessor to the corporate respondent. Central Carpet Company started doing busines on Jan. 5, 1973. The business was taken over by Central Carpet Corporation, Inc. when it was incorporated on May 1, 1973. Mr. Taylor was the only salesman employed by Central Carpet Company. He was the only salesman for Central Carpet Corporation, Inc., until Oct. 5, 1973 (RRA 10, 11, 13; Taylor Tr. 54, 58, 59, 306).

3. Respondents are now and for some time last past have been engaged in the advertising, offering for sale, sale and distribution and installation of carpeting and floor coverings to the public. Their gross sales for 1973 were close to $200,000. At all relevant times mentioned herein, respondents have maintained a substantial course of trade in merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, in that they now sell and ship, and for some time last past have sold and shipped, carpet from their place of business located in the State of Maryland to purchasers located in Maryland, Virginia and the District of Columbia. Respondents, moreover, are engaged in commerce by virtue of their extensive advertising in Washington area newspapers which circulate in interstate commerce (RRA 12, 45-74; Ans.; Taylor, Tr. 8, 57-59, 82, 83).

4. Respondents at all relevant times mentioned herein have been, and now are, in substantial competition in commerce with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and services of the same general kind and nature as those sold by respondents (Ans.; Taylor, Tr. 13).

5. Respondents advertised heavily in Washington area newspapers for the purpose of obtaining leads for, and inducing the purchase of, their carpeting and floor covering during the period from Jan. 7, 1973 to Oct. 6, 1974. At present, they advertise weekly in the TV Guide Section

of the Washington Star-News (Taylor, Tr. 83, 311; RRA 26). The record contains 13 Cental Carpet advertisements placed in the Washington Star-News by, or at the direction of, the respondents between Jan. 7, 1973 and Oct. 6, 1974, which are representative of all advertising placed by respondents during the relevant time period for the purpose of inducing the purchase of their carpeting and floor covering (CX 251-263; RRA 45-70).

6. CX 251, the earliest of respondents' advertisements in the record, appeared in the Washington Star and Daily News on Jan. 10, 1973. Identical advertisements appeared in that newspaper on Jan. 7, 14 and 21, 1973 (RRA 45, 46). It reads as follows:

3
ROOMS

Quality Wall to Wall
NYLON PILE CARPET

Up to 270 Sq. Ft.
PRICE INCLUDES
SEPERATE (sic)
CUSHION-EZE PADDING
AND INSTALLATION!

FREE
SHOP-AT-HOME
DECORATOR
SERVICE

$109
Call Anytime 'till
11 PM
For Free Home
Demonstration

7. CX 252 featured the same representations as CX 251 with the addition of an offer of a "Free 38 Piece Ovenware Set" with the purchase of 3 rooms of Delux 501 Nylon Carpet. The availability of other carpets was also noted. This advertisement appeared in the Washington Sunday Star and Daily News TV Magazine on Mar. 4, 1973. Identical advertisements appeared on Jan. 28, 1973, Feb. 4, 11, 18 and 25, 1973, Mar. 11, 18 and 25, 1973 and Apr. 1 and 18, 1973 (RRA 47, 48). It reads as follows:

FREE Shop-At-Home decorator service

3 ROOMS
NYLON PILE CARPET
QUALITY WALL TO WALL
UP TO 270 Sq. Ft.

$109

Easy Terms
to fit
your budget

CALL ME NOW
ASK ABOUT THESE OTHER
BEAUTIFUL CARPETS
Shag
DuPont 501
Indoor-Outdoor
Runners
Mill Ends, Etc.
ALL SIZES AND COLORS

PRICE
INCLUDES
SEPARATE
CUSHION-EZE
PADDING
and installation

FREE
38 PIECE
OVENWARE SET
When you purchase
3 Rooms of Our
Deluxe 501 Nylon
Carpet. Call Now
Custom Tackless
Installation

8. CX 253 contained representations identical to those of CX 252. It appeared in the Washington Sunday Star and Daily News TV Magazine on Apr. 15, 1973. Identical advertisements appeared on Apr. 22 and 29, 1973, and May 6 and 13, 1973 (RRA 49, 50).

9. Respondents' advertisements appearing on May 20, 1973, and thereafter changed the offer of "3 Rooms" to "Any 3 Areas" or "Up to 3 Areas" of Nylon Pile Carpet (CX 245-63; RRA 51-69), and added a parenthetical "(30 Sq. Yds.)" after the offer of "270 Sq. Ft.". The "free gift" was changed to that of one room carpeted free - any size up to 12 x 10 with the purchase of 3 rooms of Deluxe 501 Nylon Carpet in CX 258 and 259; and again changed to an offer of "free" draperies for one window, with the purchase of three rooms of Deluxe 501 carpeting in CX 260 and 261. After Feb. 3, 1974, respondents' advertisements contained no representations as to any "free" gift (RRA 58-65). Of respondents' advertisements appearing after Aug. 19, 1973, several gave the price charged for additional yardage over the advertised 270 square feet (CX 257, 258, 260-62; RRA 56-59, 62-67).

10. Throughout respondents' advertising, though changed as set forth above, certain themes remain constant. The most arresting feature in each of the advertisements is the highlighted price of $109, focusing the consumer's attention on the dominant representation that "3 rooms" or "areas" of "quality" nylon pile carpeting are being offered for $109 (Findings 6-9, *supra*). The words, "up to 270 sq. ft.," read in the context of the entire advertisements, do not detract from or limit the dominant representation that 3 rooms of quality nylon pile carpet may be had for $109. Indeed, those words could reasonably lead the consumer to believe that 270 square feet is the amount that would adequately cover the average three rooms, thus making it logical for

the advertiser to advertise in terms of "rooms." Visual inspection of respondents' advertisements in the record by the undersigned as well as consumer testimony compel the conclusion that "3 rooms" of "quality" nylon pile carpet for $109 was in each instance respondents' dominant offer. The testimony of consumer witness John Smith, on cross-examination by respondents' counsel, is instructive on this point:

> Q. Do you recall seeing in the advertisement in the TV Guide a statement that you should call Central about their other carpets, shags, DuPont 501, indoor-outdoor, runners et cetera?
>
> A. No sir, I don't remember seeing that. If it was there I overlooked it because this type carpeting was run on a special price that I was interested in and I focused all my attention on that (Tr. 254).

(And see Mylechraine, Tr. 183-84; Kirtley, Tr. 213-14; Felder, Tr. 240-41; Lewis, Tr. 256).

11. By and through the use of the above-described type of advertisements (Findings 6-10, *supra*), respondents have represented and are now representing that they were and are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in their advertisements, and that the carpeting was suitable for the uses for which advertised (Ans., Taylor, Tr. 9).

12. In truth and in fact, respondents' advertisements did not constitute bona fide offers to sell the advertised carpeting on the terms and conditions stated in the advertisements, and the carpeting was not suitable for the uses for which advertised. To the contrary, the advertisements were used primarily for the purpose of obtaining leads to persons interested in purchasing carpeting in order to sell such persons more expensive carpeting (Findings 13-17, *infra*).

13. Consumers who responded to respondents' advertisements were called upon in their homes by respondent James Taylor or another salesman of respondent Central Carpet Corporation. The salesman would exhibit what was represented as the advertised carpet[2] (CX 249, RX 2, 3 or 4). Far from being "quality" carpet, the advertised carpet was of such poor appearance and condition that it was virtually self-disparaging and was frequenty rejected on sight by the prospective customer. Respondent Taylor himself admitted that the carpeting (CX 249) was "at the low end of the spectrum of carpet offered by respondents or anyone" (RPF, p. 3); that while "the looks of the carpet [RX 2 and 3] is extremely better* * *, [t]he wear is not that much better" and that RX 4 is "possibly better" (Tr. 322-23). Albert Wahnon, editor of Floor Covering Weekly, the leading trade publication in the

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[2] CX 249 is the carpeting sold as the "advertised" carpeting from Jan. 5, 1973 through approximately June 1974 (Taylor, Tr. 322-26; RRA 15). CX 250 is the accompanying "cushion-eze" padding. Respondents substituted RX 2, 3 or 4 for CX 249, selling them as the "ad carpet," beginning in mid-1974, sometimes selling them concurrently (Taylor, Tr. 313-26.)

floor covering industry and one which regularly reviews advertisements in that industry, qualified as an expert witness in carpeting and carpet advertising (Wahnon, Tr. 409-15; RPF, p. 2). He too was of the opinion that the carpet (CX 249) was at the low end of the spectrum; that "it could not withstand too great wear * * * you could not walk over it too many times with shoes." (Wahnon, Tr. 428). The reaction of the consumer witnesses who testified in this proceeding, upon being shown the advertised carpeting, supports respondent Taylor's and Mr. Wahnon's assessment of the carpeting. Witness Mary Young's testimony was typical:

Q. What did the carpeting sample look like?

A. It was just cheesy, real thin, and looked like it had been washed, and everything.[3] (Young, Tr. 172)

(And see Mylechraine, Tr. 185; Beck, Tr. 202-03; Kirtley, Tr. 215-16; Hughes, Tr. 225; Felder, Tr. 242; Smith, Tr. 205; Lewis, Tr. 299).

14. Not only was the appearance of the advertised carpeting shoddy and patently unsuitable, but in some instances, Central Carpet salesmen openly disparaged the advertised carpeting and drew unfavorable comparisons with the higher priced lines. For example, witness Mylechraine testified as follows:

Q. Did Mr. Taylor make any remarks to you about the [advertised] carpet?

A. He said it was, more or less, for people that were going to be moving and that they would just leave it behind. (Tr. 185)

Mrs. Eleanor Lewis testified similarly:

Q. What happened when the salesman came into your home?

A. Well, he had a sample of the carpet and he showed me what was on the ad. He told me by having children it was no good, it wouldn't last.

Q. What did that advertised sample look like?

A. A piece of cheesecloth.

Q. Then what happened after the salesman said this to you about that sample?

A. He showed me better, he told me that was a better carpet, that it would last. (Tr. 258)

Respondents' own witness, Mary E. Lewis, testified to respondent James Taylor's comments on the advertised carpet as follows:

Q. What did he say about the carpet he was advertising?

A. He said the carpet he was advertising was you know, he showed me the threads and everything in it, and he said it would not hold up too long. (Tr. 302)

(And see Hughes, Tr. 226; Smith, Tr. 251). Respondent Taylor himself testified that he always told and tells his customers that the advertised carpeting will last only one to three years, while the higher priced DuPont 501 will last 20 to 30 years (Taylor, Tr. 151-52). All carpets other than the advertised $109 grade are represented as being longer lasting. The time period represented has varied from five years to the 20 to 30 years for the DuPont 501 quality (Taylor, Tr. 151-52; Mylechraine, Tr. 185-86; Hughes, Tr. 226; Eleanor Lewis, Tr. 258; Epps, Tr. 389).

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[3] This is similar to the reaction of the undersigned to his examination of CX 249.

Still another drawback to, or limitation of suitability of, the advertised carpet was the fact that it was available only in from two to four colors, whereas each of the other carpets displayed by respondents came in six or seven colors (Taylor, Tr. 88; Hughes, Tr. 225; Smith, Tr. 250).[4] As respondent Taylor explained, when he goes into a house he takes and displays seven different carpets, including the advertised $109 carpet. While he shows the $109 carpet first, he tries to ascertain what color the prospective customer is interested in (Taylor, Tr. 347).

15. Upon rejecting the advertised carpeting, customers are shown better quality carpeting by their Central Carpet salesmen which, by comparison, further serves to disparage the advertised carpeting. (See, *e.g.*, Young, Tr. 172; Mylechraine, Tr. 185-86; Beck, Tr. 203; Kirtley, Tr. 216; Hughes, Tr. 226; Smith, Tr. 251).

16. Under these circumstances and by these tactics, respondents are able to push their higher priced lines of carpeting to the virtual exclusion of the low-priced advertised carpet. Respondents made very few sales of the advertised carpeting at the price and on the terms set forth in the advertisements. There are in the record copies of customer contracts and charge tickets which reflect all sales of carpeting by respondents, except those made by James A. Taylor while working for other firms, namely Sir Carpet and Maryland Carpet Company, between Jan. 7, 1973 and Oct. 5, 1973 (CX 110-24; CX 126-29, 131-248; RRA 40). SALES OF THE ADVERTISED carpet (CX 249) can be identified on contracts and charge tickets as "nylon pile" or "nylon cut pile" (RRA 18; Taylor, Tr. 67). An examination of the exhibits reveals that only two contracts (CX 110 and 233) out of a total of 137 sales for this period were for the sale of the advertised carpet. Of these sales, only one (CX 110) was at the sale price of $109, and that was to cover a "living area" only; the other (CX 233) was for the substantially higher cash price of $381 for living room, dining room and hall. Therefore, less than one percent of Central Carpet's sales, for the only period for

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[4] Customer Hughes, for example, was shown two colors of the advertised carpet (Hughes, Tr. 225). Customer Smith was shown three (Smith, Tr. 250).

which complete records are in evidence, was for the sale of the advertised carpet at or less than the advertised price.[5]

Over 98 percent of the total sales were for more than $109.[6] Approximately 100 sales, or more than 73 percent of the total sales in evidence, were for more than $400, excluding tax and finance charges. Approximately 54, or nearly 40 percent, were for over $500. Nearly 22 percent were at prices greater than $600. Five percent of total sales in the record were for prices greater than $800, exclusive of tax and finance charges, and three customers made purchases of over $1000.

17. The representations set forth in Findings 10 and 11, *supra*, were false, misleading and deceptive and had the tendency and capacity to deceive members of the purchasing public.

18. Respondents' advertisements, as set forth in Findings 7-9, *supra*, have represented further that purchasers of the DuPont 501 carpet receive a "free" 38-piece ovenware set or other "free" gift.

19. In truth and in fact, purchasers of respondents' DuPont 501 carpet did not receive a "free" 38-piece ovenware set. Respondents have no regularly established selling price for their carpet on which a "free" offer could be based (Taylor, Tr. 61-62). Moreover, the cost of the ovenware set was regularly included by respondents in the selling price of the carpet sold to such customers. Respondents state that they carried the cost of each ovenware set in their advertising budget from March through September 1973 (RPF, p. 4). It is irrelevant where they "carried" this cost. Respondent James Taylor himself testified that he included the cost of this "free" gift in calculating the price of his carpeting (Taylor, Tr. 61) (And see RRA 43). Moreover, he admitted that at times he has reduced the price of a customer's purchase on condition that the customer forego the "free" gift (Tr. 103-05, 133; CX 121, 156, 158, 179; RPF, p. 4).

20. Since purchasers of respondents' DuPont 501 did not in fact receive a "free" gift of ovenware with their purchase of carpeting, respondents' representation as set forth in Finding 18 is unfair, misleading and deceptive, and has the tendency and capacity to deceive members of the purchasing public.

21. During the period between Jan. 7, 1973 and May 13, 1973, respondents advertised carpeting in terms of square feet only (CX 251, 252, 253; Findings 6-8, *supra*), using the phrase "up to 270 sq. ft.". After that date, they added a parenthetical "(30 sq. yds.)" to the "270 sq. ft." Respondent Taylor admitted that this change was made in response to

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[5] The situation may realistically be viewed as no "advertised" sales having been made. The one sale of the advertised quality of carpet at $109 was to cover one room The newspaper offer represented that three rooms or areas would be covered for $109 (Finding 10, *supra*).

[6] There were two sales of pieces of carpeting-other than the advertised carpeting-at less than $109.

"F.T.C. displeasure" (RPF, p. 2); that he was "nudged a little" by the Federal Trade Commission (Taylor, Tr. 137).

22. Mr. Albert Wahnon, the expert in the field of retail carpet advertising (Finding 13, *supra*), testified that the customary and, in fact, standard unit of measurement employed by carpet retailers in their advertisements is the square yard (Wahnon, Tr. 424-25). Respondents themselves admitted that, except for certain carpet dealers who advertise quantities of carpet in terms of a number of rooms for a stated price, the unit of measurement usually and customarily employed in the retail advertising of carpet is the square yard (RRA 39).

23. Since the unit of measurement customarily employed in the retail advertising of carpet is the square yard, consumers are accustomed to comparing prices of carpeting in terms of price per square yard. Respondents' use of "square feet" alone in their advertisements inhibited an accurate comparison, tended to exaggerate the amount of carpet being offered, both absolutely and in comparison to competitors who advertised in terms of square yards, and thus had the tendency and capacity to mislead and deceive consumers into believing they would get more carpeting for their money than was the fact. This tendency was bolstered by other representations in the advertisements that the offered carpeting would be sufficient for "three rooms" or "3 areas" wall to wall. Moreover, testimony in the record indicates that consumers were in fact deceived into thinking that the offered amount of 270 square feet would cover the areas they desired to carpet, when in fact those areas were much larger (Mylechraine, Tr. 188; Kirtley, Tr. 214; Hughes, Tr. 224-25; Felder, Tr. 243).

24. Between Jan. 7, 1973 and Aug. 19, 1973, respondents offered their featured advertised carpeting in terms of a set quantity-270 square feet or 30 square yards-for $109. This is an effective rate of approximately $3.63 per square yard (Findings 6-9, *supra*). In making such offers, respondents failed to reveal the material fact that, for additional quantities of the carpeting over and above the stated amount customers would be charged, variously $5.99 or $7.00 per square yard (RRA 21; Taylor, Tr. 92-93). Beginning with September 23, 1973, several of respondents' advertisements supplied the information that quantities of the advertised carpeting over and above 270 square feet would cost the purchaser $5.99 per square yard (CX 257, 258, 260-63; finding 9, *supra*). Respondents admitted that this change in their advertisements was made as a result of "F.T.C. displeasure", that they were "nudged by the Federal Trade Commission" into making the change (RPF 2; Taylor, Tr. 335).

25. Respondents' failure to disclose the aforementioned material fact had the tendency and capacity to deceive consumers into believing that prices charged for quantities of carpeting in excess of the featured area would be at a rate identical to, or at least not substantially higher than, that indicated for the specified area.

26. Through the use of the unfair, false, misleading and deceptive statements, misrepresentations and practices found above, respondents and their salesmen have been able to induce customers into signing contracts upon initial contact, without giving them time to consider carefully the purchase and the consequences thereof. Ninety-nine percent of respondents' sales leads are from newspaper advertisements featuring the $109 carpet (Taylor, Tr. 311). The consumer witnesses who testified in this proceeding were almost uniformily attracted to respondents' offer of carpeting for $109; yet they and practically all of respondents' customers signed contracts on the initial contact for more expensive carpeting in amounts costing substantially more than the featured $109 (Findings 10, 16, *supra*). Respondent Taylor testified that "99.44 percent" of his sales were consummated on the initial visit to the customer's home (Tr. 153).

DISCUSSION

Individual Liability of James A. Taylor

Respondents make no argument against holding James A. Taylor liable in his individual capacity for the acts and practices that may be found unfair and deceptive. It is settled that to prevent erosion of its orders, the Federal Trade Commission has the authority to name individually, officers, directors and the stockholders of corporations when they have participated in or controlled the challenged acts or practices. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112 (1937); *Rayex Corporation* v. *Federal Trade Commission*, 317, F.2d 290 (2d Cir. 1963); *Standard Distributors* v. *Federal Trade Commission*, 211 F.2d 7 (2d Cir. 1954). As the individual solely responsible for every facet of Central Carpet Corporation, Inc.'s operations, James A. Taylor is unquestionably liable for the acts and practices found herein.

The Unfair and Deceptive Acts and Practices

"Bait and Switch"

Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of a bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised. *Guides Against Bait Advertising,* 16 C.F.R. §238.0 (1957). Bait advertising and the practice of bait and switch whereby the customer responding to the "bait" is "switched" to a higher priced item have been repeatedly condemned by the Commission and the courts. *Tashof* v. *Federal Trade Commission,* 437 F.2d 707(D.C. Cir. 1970); *Consumers Products of America, Inc.* v. *Federal Trade Commission,* 400 F.2d 930 (3rd Cir. 1968), *cert. denied,* 393 U.S. 1088; *Guides Against Bait Advertising,*16 C.F.R. §238.1-.4 (1975). Factors evincing bait advertising and a bait and switch scheme include, among others, the use of an offer using statements or illustrations that create a false impression of the grade, quality or usability of the offered product such that on disclosure of the true facts, the purchaser might be switched to another product; and the discouragement of the purchase of the advertised article by refusing to show it, disparaging the product by acts or words, or showing of a product which is defective, unusable or impractical for the purpose represented or implied in the advertisement. *Guides, supra,* §238.2(a), 238.3(a), (b), (e).

In light of the above, it is clear that respondents' advertising and selling practices constitute a bait and switch scheme. The "bait" here, which successfully caught the attention of consumers, is low quality, inferior and very unattractive carpeting, limited as to colors in which available, advertised and offered as "quality" "wall to wall" carpeting in amounts sufficient to cover three rooms or three areas at a very low price. In no way could this be considered a bona fide offer. The terms of the offer could not in fact be filled, because the product referred to was in fact *not* "quality"-with all that the word implies in terms of durability and attractiveness, *nor* was it suitable for wall to wall installation, *nor* would the amount offered usually cover three rooms or three "areas." The offer was patently a means of obtaining leads to persons who wanted carpeting. Exhibition of the advertised carpet was generally sufficient in itself to switch the prospective customer to higher priced carpeting-it was a self-disparaging product. The record here is devoid of some of the more outrageous examples present in other cases of salesmen's efforts to disparage their product and discourage its purchase, although even here, respondents' salesmen did point out all the shortcomings of their featured carpet.

As discussed above, the poor appearance of the carpet, together with the few colors in which it was available, made it unnecessary for the salesman to do more than merely exhibit the carpet to disparage it. At any rate, it is not essential to show evidence of actual disparagement of the advertised product to find "bait and switch." It may be inferred that customers were "switched" from the advertised product by evidence of bait advertising, present here, and minimal sales of the advertised product. *Tashof* v. *Federal Trade Commission, supra,* at 709-10; see also, *National Lead Co.* v. *Federal Trade Commission,* 227 F.2d 825, 832 (7th Cir. 1955), *rev'd on other grounds,* 352 U.S. 419 (1957). Only one sale of the advertised carpeting at the advertised price is in the record-representing less than 1 percent of respondents' total carpet sales in evidence (Finding 16, *supra*). This is certainly "minimal" sales.[7] The great number of sales of higher priced carpeting shows the success of the "switch."

Respondents argue that they never refused to show or demonstrate the advertised carpet and that they were always willing to sell it (RPF 3). The undisputed fact remains that the appearance of the advertised carpet alone could and did "switch" customers to higher priced carpeting. Respondents argue further that their salesmen were merely telling the truth in pointing out the advertised carpet's shortcomings (RPF 3; RRB 3). Clearly, however, the law is violated if the first contact with a customer is secured by deception, as here in the form of respondents' advertisements. *Guides, supra,* §238.2(b). An integral part of respondents' business operation, therefore, consisted of "baiting" the consumers with misleading advertisements of inexpensive carpeting, and subsequently "switching" them to higher priced carpeting through demonstrating and comparing the inferior carpeting with better quality goods. Respondents' purpose was accomplished, though it was unnecessary for them to resort to some of the egregious tactics employed in other "bait and switch" schemes.

Use of the Word "Free"

To represent that merchandise or services are offered "free" in connection with the sale of other merchandise or services, there must have been an established regular price on which to base the "free" offer. *Federal Trade Commission* v. *Mary Carter Paint Co.,* 382 U.S. 46 (1965). it is plainly deceptive to represent as was done by these respondents that an ovenware set is "free" if its cost, unknown to the purchaser, is included in the price of the advertised carpeting. *Sunshine Art Studios, Inc.* v. *Federal Trade Commission,* 481 F.2d 1171 (1st Cir. 1973); *Mary Carter Paint Co., supra; Guide Concerning Use of the Word "Free" and Similar Representations,* 16 C.F.R. 251 (1975).

Use of "Square Feet" and Undisclosed Rates

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[7] The fact that for the only period for which there is documentary evidence, advertised carpet sales represented less than 1 percent of all sales tends, at best, to cast doubt on the accuracy of respondent Taylor's recollection that for all of 1973 and 1974 sales of the advertised carpet amounted to 7 percent of all carpet sold by respondents. Moreover, sales of the advertised merchandise does not preclude existence of a "bait and switch" scheme. It has been determined that, on occasions, this is a mere incidental by-product of the fundamental plan and is intended to provide an aura of legitimacy to the overall operation. *Guides To Bait Advertising, supra.*

In consideration of the fact that the unit of measurement customarily employed in advertising carpeting is by the square yard, the advertising of carpeting in terms of square feet, without disclosing the equivalent in square yards, is unfair and deceptive because (1) it inhibits an accurate comparison of respondents' prices with those of competitors, and (2) because it tends to exaggerate the amount of carpet being offered.

Further, it is an unfair trade practice to fail to reveal any relevant and material facts concerning representations in an advertisement where such information might be important to the prospective customer in making his decision as to whether to purchase the product advertised. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Spiegel, Inc.* v. *Federal Trade Commission,*495 F.2d 59 (7th Cir. 1974). Therefore, respondents' practices of advertising carpeting in terms of square feet only and of failing to disclose the higher rates charged for quantities of carpeting beyond the advertised amounts are unfair and have the tendency and capacity to deceive the public. It is of no matter that customers were informed of the true facts concerning respondents' offers before they made their purchases. The harm was done on initial contact in that these practices tended to enhance the "bait" quality of respondents' advertisements. *Exposition Press, Inc.* v. *Federal Trade Commission,*295 F.2d 869, 873 (2d Cir. 1961), *cert. denied,* 370 U.S. 917(1962); *Carter Products, Inc.* v. *Federal Trade Commission,*186 F.2d 821, 824 (7th Cir. 1951).

Respondents argue that there was no evidence presented that persons responding to advertisements of respondents were misled by the failure to specify the cost of additional yardage and that no evidence was presented that such persons were misled by the use of square feet into thinking that they were being offered a greater quantity of carpeting than was the fact (RPF 5, 7). To the contrary, the record does establish that customers received the impression that greater amounts of carpet were being offered than was the fact (Finding 23, *supra*). In any event, evidence of actual deception of the public is not necessary to a finding of violation, a tendency and capacity to deceive being sufficient. *Feil* v. *Federal Trade Commission,* 285 F.2d 879 (9th Cir. 1960); *Montgomery Ward* [*Co.* v. *Federal Trade Commission,* 379 F.2d 666 (7th Cir. 1967). The Federal Trade Commission Act was not intended to protect only the sophisticated, but the unthinking and credulous who do not stop to analyze but are governed by general impressions. *Giant Food, Inc.* v. *Federal Trade Commission,* 332, F.2d 977 (D.C. Cir. 1963); *Helbros Watch Company, Inc.* v. *Federal Trade Commission,* 310 F.2d 868 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 976 (1963). Therefore, in the context of all representations made, upon his own examination of the advertisements as well as the other pertinent portions of the record, the undersigned concludes that the use of square feet and the failure to disclose higher rates on quantities above the advertised amounts have the tendency and capacity to deceive the consumer. *J.B. Williams Co.*v. *Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967).

Cooling Off Period

In view of the facts that (1) respondents are able to secure entry into potential customers' homes by virtue of advertisements that stress the availability and suitability of inexpensive carpeting, (2) the actual sales made are almost invariably of a much higher priced carpet and for a substantially greater expenditure than that indicated in the advertisements and (3) these sales are practically always made upon the initial visit of the salesman, it is clear that respondents' customers require the protection of a "cooling off" period of the type enunciated in the Commission's Trade Regulation Rule, *Cooling Off Period For Door-To-Door Sales*, 16 C.F.R. Section 429 (1975).[8] Such protection will be afforded by the order.

The Remedy

The Commission is vested with broad discretion in determining the type of order necessary to ensure the discontinuance of the unlawful practices found. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965). The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608,613 (1946); *Federal Trade Commisson* v. *Ruberoid Co.*, 343 U.S. 470 (1952). It is also settled that the Commission, as part of its remedial powers, has the authority to require respondents to take affirmative action, or make affirmative statements in advertising. *Federal Trade Commission* v. *Colgate-Palmolive, supra; American Cyanamid Co.* v. *Federal Trade Commission*,401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

The order is reasonably related to the unlawful practices found and has been devised to bring about cessation of such practices. In addition to proscribing the unlawful acts and practices found and variations of those practices, the order is also directed at certain aspects of the unlawful practices which played an integral part in their execution. For example, numbered paragraphs 14, 15 and 16 of the order are directed at specific aspects of the bait and switch that helped make the practice work. The inclusion in the advertisements of references to carpeting for "3 rooms" or "3 areas" or "up to 3 areas", regardless of how qualified, tends to infer that three rooms or areas will be carpeted. As an integral part of the bait, such advertising should be proscribed unless the rooms or areas referred to will be fully covered at the price advertised. Similarly, featuring carpeting which, for all practical purposes has limited suitability or availability because of a limited number of colors or short life expectancy under normal or not unusual conditions of use has also been an integral part of the bait. Such advertising should be proscribed unless the limitations are disclosed.

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[8] It is of no moment that the record does not contain actual evidence of instances of hard pressure tactics. The very fact that individuals who invite respondents into their homes to display an advertised inexpensive carpeting are somehow prevailed upon, on the very first calls, to contract for much more expensive carpeting demonstrates that respondents' customers require a "cooling off" period to reconsider what they have obligated themselves to do.

Respondents argue that since they have discontinued any offer of a "free gift" and have added the square yard measurement to their advertisements, an order addressed to those matters is no longer necessary (RPF, p. 8). It is settled that discontinuance or abandonment of a practice does not prevent the issuance of a cease and desist order directed to such practice. *Giant Food, Inc.*, 61 F.T.C. 326 (1962). This principle is particularly applicable to situations where the discontinuance was not entirely voluntary but occurred only after the Commission had begun an investigation into such practices, where respondent continues in the same line of business and where there is no guarantee that the practices may not be resumed. *Coro, Inc.*, 63 F.T.C. 1164, 1201 (1963), *modified and aff'd.*, *Coro, Inc.* v. *Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). Respondents discontinued their "free gift" offer, and added "square yards" to their advertisements long after the first investigational hearing of March 20, 1973. Respondent Taylor himself admitted that he made the changes of adding "square yards" and disclosing the cost of carpeting over the specific advertised quantity only as a result of being "nudged" by the Commission (Findings 21, 24, *supra*). It should be noted that Mr. Taylor is still engaged in the same retail carpet business and there is no reason to believe he will not continue in that business. Under such circumstances, an order directed to the aforementioned practices is most appropriate and necessary. Without an order, the public has no definite assurance that the unlawful practices will not be resumed in the future.

In the "Notice Order" attached to the complaint, and in their proposed order, complaint counsel have included a provision requiring respondents to disclose clearly and conspicuously, by means of a black-bordered notice in all their advertisements, the fact that the Commission has found that they "engage in bait and switch advertising."

Despite the wide leeway granted the Commission in framing orders, the undersigned will not adopt such a proposal in this case. In four recent cases, *Wilbanks Carpet Specialists*, Docket No. 8933 (Sept. 24, 1974 [84 F.T.C. 510]); *Tri-State Carpets, Inc.*, Docket No. 8945 (Oct. 15, 1974 [84 F.T.C. 1078]); *Theodore Stephen Co., Inc.*, Docket 8944 (Jan. 28, 1975 [85 F.T.C. 152]); and *Sir Carpet, Inc.*, Docket 8981 (Feb. 6, 1975 [85 F.T.C. 190]), the Commission has struck similar warning provisions from orders issued in the initial decisions. The Commission held that the records in those cases presented insufficient evidence that a consumer warning was a necessary or appropriate means for the termination of the acts or practices complained of or for the prevention of their recurrence. The record in the instant matter presents no stronger evidence in this regard and complaint counsel's request is rejected.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has had, and now has, jurisdiction over respondents, and the methods of competition and acts and practices charged in the complaint and found herein took place in commerce as "commerce" is defined in the Federal Trade Commission Act.

2. Respondents have engaged in false, misleading and deceptive advertising, and used unfair methods of competition and unfair and deceptive acts and practices in the offering for sale, sale and distribution of carpeting and floor coverings.

3. The aforesaid methods of competition and acts and practices of respondents were and are to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Central Carpet Corporation, Inc., a corporation, its successors and assigns, and its officers, and James A. Taylor, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, distribution, and installation of carpeting and floor coverings, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of carpeting or other merchandise or services.

2. Making representations, directly or indirectly, orally or in writing, purporting to offer merchandise or services for sale when the purpose of the representation is not to sell the offered merchandise or services but to obtain leads or prospects for the sale of other merchandise or services at higher prices.

3. Disparaging in any manner, or discouraging the purchase of any merchandise or services which are advertised or offered for sale.

4. Representing, directly or indirectly, orally or in writing, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Failing to maintain and produce for inspection and copying for a period of three (3) years following the date of publication of any advertisement, adequate records to document for the entire period during which each advertisement was run and for a period of six (6) weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price; and

c. a computation of the net profit from the sales of each advertised product or service at the advertised price.

6. Representing, directing or indirectly, orally or in writing, that any price amount is respondents' regular price for any article of merchandise or service unless said amount is the price at which such merchandise or service has been sold or offered for sale by respondents for a reasonably substantial period of time in the recent, regular course of their business and not for the purpose of establishing fictitious higher prices upon which a deceptive comparison or a "free" or similar offer might be based.

7. Representing, directly or indirectly, orally or in writing, that any merchandise or service is furnished "free" or at no cost to the purchaser of advertised merchandise or services, when, in fact, the cost of such merchandise or service is regularly included in the selling price of the advertised merchandise or service.

8. Representing, directly or indirectly, orally or in writing, that a "free" offer is being made in connection with the introduction of new merchandise or services offered for sale at a specified price unless the respondents expect, in good faith, to discontinue the offer after a

limited time and commence selling such merchandise or service, separately, at the same price at which it was sold with a "free" offer.

9. Representing, directly or indirectly, orally or in writing, that merchandise or service is being offered "free" with the sale of merchandise or service which is usually sold at a price arrived at through bargaining, rather than at a regular price, or where there may be a regular price, but where other material factors such as quantity, quality, or size are arrived at through bargaining.

10. Representing, directly or indirectly, orally or in writing, that a "free" offer is available in a trade area for more than six (6) months in any twelve (12) month period. At least thirty (30) days shall elapse before another such "free" offer is made in the same trade area. No more than three such "free" offers shall be made in the same area in any twelve (12) month period. In such period, respondents' sales in that area of the product or service in the amount, size or quality promoted with the "free" offer shall not exceed 50 percent of the total volume of sales of the product or service, in the same amount, size or quality, in the area.

11. Representing, directly or indirectly, orally or in writing, that a product or service is being offered as a "gift," "without charge," "bonus," or by other words or terms which tend to convey the impression to the consuming public that the article of merchandise or service is free, when the use of the terms "free" in relation thereto is prohibited by the provisions of this order.

12. Advertising the price of carpet, either separately or with padding and installation included, for specified areas of coverage without disclosing in immediate conjunction and with equal prominence the square yard price for additional quantities of such carpet with padding and installation needed.

13. Advertising any carpeting or floor covering using square feet as the unit of measurement, unless square yards is also employed as the unit of measurement in immediate conjunction therewith and with equal prominence or using any term or terms which tends to exaggerate the size of quantity of carpeting or floor covering being offered at the advertised price.

14. Advertising the price of carpet, either separately or with padding and installation included, in terms of an area or areas unless the area or areas will be fully covered at the price advertised.

15. Featuring in an advertisement any carpet for use in wall to wall installation which carpet is not suitable for use in heavy traffic, in a household having children or over a particular number of individuals or which may not reasonably be expected to last at least five (5) years, without conspicuously disclosing any of such limitations.

16. Featuring in an advertisement any carpet which is available in five or less colors without conspicuously disclosing the colors in which the carpet is available.

17. Contracting for any sale whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

18. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used in bold face type of a minimum size of 10 points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

19. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION", which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

[*enter date of transaction*]

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE. IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED. IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK. IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY

FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT. TO CANCEL THIS TRANSACTION MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [*Name of Seller*], AT [*address of seller's place of business*], NOT LATER THAN MIDNIGHT (*date*).

I HEREBY CANCEL THIS TRANSACTION.

____
(Date)

____
(Buyer's signature)

20. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

21. Including in any sales contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

22. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

23. Misrepresenting, directly or indirectly, orally or in writing, the buyer's right to cancel.

24. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

25. Negotiating, transferring, selling, or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

26. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to reposses or to abandon any shipped or delivered goods.

Provided, however, That nothing contained in this order shall relieve respondents of any additional obligations respecting contracts required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent, respondents can apply to the

Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon showing, shall make such modifications as may be warranted in the premises.

It is further ordered, That respondents shall maintain for at least a one (1) year period, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor coverings and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by respondents to obtain leads for the sale of carpeting or floor coverings and other merchandise, with a copy of this order.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale, sale of any product, consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the respondent James A. Taylor promptly notify the Commission of the discontinuance of his present business or employment and of his affiliations with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

FINAL ORDER

The administrative law judge filed his initial decision in this matter on Apr. 17, 1975, finding respondents to have engaged in the acts and practices as alleged in the complaint and entering a cease and desist order against respondents. A copy of the initial decision and order was served on the respondents on May 9, 1975. No appeal was taken from the initial decision.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision should become effective as provided in Section 3.51(a) of the Commission's Rules of Practice,

It is ordered, That the initial decision and order contained therein shall become effective on the date of issuance of this order.

It is further ordered, That respondents shall, within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

C. D. PAIGE COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2672. Complaint, June 12, 1975–Decision June 12, 1975

Consent order requiring an East Providence, R.I., seller of insurance at retail, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Raymond J. McNulty.*

For the respondents: *Richard T. Linn, Gunning, LaFazia, Gnys & Selya, Inc.*, Providence, R.I.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that C. D. Paige Company, Inc., a corporation, trading and doing business as Premium Budget Plan, and Kenneth E. Norris, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent C. D. Paige Company, Inc., trading and doing business as Premium Budget Plan, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 680 Warren Ave., East Providence, R. I.

Respondent Kenneth E. Norris is an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporation, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are and have been, engaged in the offering for sale and sale of insurance to the public at retail.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents offer to extend consumer credit and extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing Regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents in the ordinary course of business as aforesaid, and in connection with their financing of insurance premiums which are credit sales as "credit sale" is defined in Regulation Z, have caused, and are causing, their customers to enter into contracts for the purchase of insurance, by executing a binding combination promissory note and disclosure statement, hereafter referred to as the "statement." Respondents provide these customers with no consumer credit cost disclosures other than on the statement.

By and through the use of the statement, respondents:

1. Failed in some instances to identify the amount or method of computing the amount of any default, delinquency, or similar charge payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

2. Failed in some instances to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

3. Failed in some instances to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe the sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

4. Failed in some instances to disclose the method of computing any

unearned portion of the finance charge in the event of prepayment of the obligation as required by Section 226.8(b)(7) of Regulation Z.

5. Provide additional information which misleads or confuses the customer or obscures or detracts attention from the information required to be disclosed by Regulation Z, in violation of 226.6(c) of Regulation Z.

6. Failed to preserve evidence of compliance with Regulation Z for a period of not less than two years after the date each disclosure is required to be made as required by Section 226.6(i) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the implementing regulation promulgated thereunder and violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 (b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent C. D. Paige Company, Inc., trading and doing

business as Premium Budget Plan, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its office and principal place of business located at 680 Warren Ave., East Providence, R. I.

Respondent Kenneth E. Norris is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered That respondents C. D. Paige Company, Inc., a corporation, trading and doing business as Premium Budget Plan or under any other name or names, its successors and assigns, and its officers, and Kenneth E. Norris, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. § 1601, *et seq.*) do forthwith cease and desist from:

1. Failing to identify the amount or method of computing the amount, of any default, delinquency, or similar charge payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

2. Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

3. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

4. Failing to identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligations as required by Section 226.8 (b)(7) of Regulation Z.

5. Stating, utilizing or placing any additional information in conjunction with the disclosures required to be made by Regulation Z, which information misleads, confuses, contradicts, obscures or detracts

attention from disclosure of information required to be disclosed by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

6. Failing in any consumer credit transaction to preserve evidence of compliance for a period of not less that two years as required by Section 226.6(i) of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit, or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

NATIONAL DYNAMICS CORPORATION, ET AL.

OPINION AND MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8803. Decision, Feb. 16, 1973 Modified Order June 17, 1975*

Order further modifying order issued Mar. 4, 1975, 40 F.R. 19459, (p. 390 herein), against a New York City seller of battery additive, VX-6, and other products, by eliminating certain "loopholes" in the earlier order, while setting forth in some detail and with greater clarity a wide variety of options available to

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* See 82 F.T.C. 488.

respondents for making truthful claims concerning the earnings of their distributors.

Appearances

For the Commission: *Jeffrey Tureck* and *Michael C. McCarey.*
For the respondents: *Solomon H. Friend,* N.Y., N.Y.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

Complaint counsel have filed a "Petition for Reconsideration" of the Commission's order in this matter issued on Mar. 4, 1975. Respondents have replied in opposition. In order to obtain more time within which to consider the petition for reconsideration, the Commission, by order dated May 27, 1975, stayed the effective date of its Mar. 4 order, and thereby, the time within which respondents might appeal it. The order of Mar. 4 modified an earlier cease and desist order of the Commission, pursuant to remand from the United States Court of Appeals for the Second Circuit, which had instructed that the original order be changed.

Having reviewed the arguments made by complaint counsel in their petition for reconsideration, and respondents' arguments in opposition, and after conducting our own review of the order previously entered, we have determined that it must be modified in order to accomplish the purposes intended by the Commission when it issued its opinion and order of Mar. 4. The order as revised is designed to eliminate certain "loopholes" in the earlier order to which complaint counsel have properly objected, while setting forth in some detail and with greater clarity a wide variety of options available to respondents for making truthful claims concerning the earnings of their distributors, consistent with the mandate of the Court of Appeals.

The Commission's original order in this matter, of which the Court of Appeals disapproved, limited respondents essentially to representations of average earnings. The Court of Appeals remanded with the instructions that respondents should not be limited to average earnings. The Court suggested that the Commission consider permitting ranges of earnings to be represented, and implied, by its reference to an earlier assurance of voluntary compliance, that truthful testimonials should also be allowed, though cautioning that respondents must not be allowed to make deceptive use of the unusual earnings of a few.

In fashioning our modified order, we have proceeded on the theory that respondents should be allowed to make a wide variety of simple, truthful, nondeceptive statements concerning the earnings of their distributors. At the same time, they must be prevented from bandying about high earnings achieved by a minority of purchasers with no indication of the unrepresentativeness of such earnings. If respondents lack evidence that the high reported earnings of a few distributors are in fact representative of the earnings of large numbers of other distributors, then it is clearly deceptive for them to portray the minority results reported to them without a clear indication of their unrepresentativeness. The appended order embodies a general prohibition on representations of past earnings, followed by a detailed enumeration of various broad sorts of earnings claims, in addition to average earnings claims which respondents may make:

(1) *Average or median earnings*. The order makes clear that any true statement of average or median earnings achieved by distributors during any particular stated past time period is permissible. For example;

1. Last year our distributors earned an average of $_____.
2. In 1971 our distributors earned an average of $_____.
3. For all of 1973 our distributors earned an average of $_____per month.
4. In May, 1973, our distributors earned an average of $_____.

The requirement that respondents provide some indication of the time period upon which a statement of earnings is based is implicit in the requirement that they not misrepresent past earnings, a prohibition sanctioned by the Court of Appeals. Failure to disclose that represented achievements are in fact several years old is clearly misleading, since the assumption of readers is likely to be that they are based on recent information.

(2) *Statement of non-average, non-median earnings achieved by a substantial number of purchasers.* Respondents may wish to advertise that some number of their purchasers have earned some stated figure or more when the stated figure exceeds the average. The order would permit all representations of this sort, provided that a substantial number of purchasers have in fact earned the stated figure or more, and provided that a clear and conspicuous disclosure is made of the percentage of the total number of distributors constituted by those who, according to respondents' representations, have achieved or exceeded the stated amount. The percentage disclosure is necessary in order to avoid the misleading implications of statements such as "Hundreds of our distributors have earned $_____ or more" when the hundreds constitute only a tiny fraction of all purchasers. Examples of the numerous earnings claims permitted by this section would be the following:

1. Last year at least 585 of our distributors (_____% of all our distributors) earned $_____ or more.
2. In 1972, _____% of our distributors earned $_____or more.
3. In all of 1973, hundreds of our distributors (_____% of all distributors) earned an average of $_____% or more per month.

4. In May, 1973, at least 600 of our distributors (_____ % of the total) earned $_____ or more.

(3) *Statements of earnings ranges.* As complaint counsel have pointed out in their petition for reconsideration, statements of ranges may be deceptive if the earnings ranges are too large. A consumer presented with a statement that thousands of distributors have earned from "$____ to $____" is likely to assume that the average lies somewhere near the middle of the range, and that substantial numbers of people have achieved results in the top of the range. As complaint counsel point out in their petition for reconsideration, stipulated records in this case show for a particular year that over 99 percent of respondents' distributors earned under $10,000, while a few earned in excess of $25,000. Common sense, moreover, would suggest that in most business opportunity situations one would find a few exceptional individuals performing well above average, rather than an even distribution of earnings results from bottom to top. Thus, the use of an unduly large range which encompasses the exceptional earnings of a few will result in deception, with the extent of deception increasing as the range does.

Complaint counsel's solution to this problem is to require that respondents state figures for each quartile of any earnings range they choose to employ. This solution, however, would not be fair in instances where respondents properly employed narrow ranges in an effort to present an accurate portrayal of their purchasers' earnings, nor would it entirely suffice in instances where respondents chose ranges so large that even quartiles thereof might be unduly broad. We think it is clear that in suggesting that the Commission fashion its order to permit the use of earnings ranges, the Court of Appeals anticipated that respondents would make use of reasonably descriptive ranges. In dealing with this problem in the past the Commission has at times adopted the approach of mandating particular ranges within which disclosures must be made.[1] In an effort to allow respondents maximum flexibility consistent with the nondeceptive use of earnings ranges, we believe the most appropriate solution in this case is to set an outer limit on the size of permissible ranges.

The order as revised will limit the size of permissible ranges to $4,000 for representations of yearly earnings and proportional amounts for other time periods. Stipulated evidence in this case, indicated that for a recent year over 99 percent of respondents' distributors earned $10,000 or less. Thus, if respondents wish to use earnings ranges to give consumers an accurate picture of the earnings achieved by their distributors, it appears they will be able to cover the earnings of over

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[1] See *Universal Credit Acceptance Corp., et al.*, 82 F.T.C. 570, 670 (1973), reversed as to another issue, sub nom *Heater v. Federal Trade Commission*, 503 F.2d 321 (9th Cir. 1974).

99 percent of their distributors by use of at most three ranges. Even allowing for some measure of inflation and improvement in the performance of respondents' distributors, it would appear that at most four or five $4,000 ranges will, for the foreseeable future, be adequate to permit a description of the earnings of all but a tiny, unrepresentative handful of purchasers.[2] Larger ranges, in light of these considerations, could too easily be used to deceive. In the event that circumstances should change in the future and respondents can demonstrate that the order as drafted would prevent them from describing the earnings of the vast majority of their distributors by means of a small number of ranges, they may petition the Commission to modify its order.

In addition, the order as revised requires that in stating any range, respondents must indicate the percentage of their distributors who have achieved results within the range. As noted with respect to statements of non-average earnings above, this requirement is necessary to avoid the misleading implications of such statements as "Hundreds of our distributors have earned from $____ to $____" when in fact the hundreds may constitute only a small fraction of the total. In the event, however, that respondents choose to employ ranges beginning with $0 and proceeding continuously upward, they need only indicate the number *or* percentage of distributors within each range. Under such circumstances a consumer can readily determine the significance of large absolute numbers in the higher ranges.

As in the case of other provisions, the one respecting earnings ranges requires that they must apply to "any stated period of time." Once again, this phrase is intended to require that respondents indicate the year in which stated results were compiled, as well as whether the results are yearly results, monthly averages, the results of one month only, or whatever. We think this is clearly implied in any requirement that respondents not misrepresent earnings. Pursuant to subsection (3) of the order, following are examples of the many sorts of representations which respondents would be able to make:

1. In 1973, (*number*) of our distributors (______%) of all our distributors) earned from $6-10,000.
2. In April, 1972, ______% of our distributors earned from $350-700.
3. In the first 9 months of 1973, (*number*) of our distributors (______% of the total) earned from $400-750 each month.
4. In 1972, our distributors achieved the following earnings:

$0-4,000	(number or percentage)
$4-8,000	"
$8-12,000	"

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[2] Respondents can, of course, encompass the earnings of all those at the top with a representation in the form "$______or more," permitted by the order, or by use of testimonials, *infra*.

$12,000 and up

(4) *Earnings testimonials.* Complaint counsel are correct, we believe, in pointing out that even though a consumer may be apprised that an earnings testimonial represents a "better than average" result, the consumer is still likely to assume that testimonial results represent an achievement that is within the realm of reasonable possibility for herself or himself. Thus, if a truthful testimonial represents a performance that has been achieved by only one or a handful of purchasers out of thousands, it is likely to convey a misleading impression even in the presence of a disclosure that it is a "better than average" result. For this reason, we believe it necessary to alter the treatment given to this problem in our order of March 4. One possible solution would be simply to prohibit the use of testimonials which describe a performance which has not been matched or exceeded by a representative fraction of respondents' purchasers. An alternative would be to require a disclosure which adequately apprises the consumer of the full extent of the disparity between the testimonial performance and the performance of others. Under the circumstances of this case we believe an appropriate resolution is to permit all truthful testimonials, provided the following disclosures are made:

1. A statement of the average amount of time per day, week or month spent by the purchaser to achieve the stated performance;

2. The year or years during which, and the geographical area in which the results were achieved;

3. If the results achieved by the purchaser have been accomplished or exceeded by fewer than 10 percent of its distributors, either of the following disclosures, in conspicuous boldface type:

(a) a statement of the average or median achieved by all distributors; or

(b) the following statement in boldface type: IMPORTANT NOTICE: THE RESULTS DESCRIBED ABOVE ARE SUBSTANTIALLY IN EXCESS OF THE AVERAGE RESULTS ACHIEVED BY ALL OUR DISTRIBUTORS. OUR RECORDS SHOW THAT ONLY ____% OF OUR DISTRIBUTORS HAVE EQUALLED OR EXCEEDED THE PERFORMANCE DESCRIBED ABOVE DURING THE INDICATED TIME PERIOD.

4. If respondents have records to indicate that the results achieved by a purchaser have been matched or exceeded by more than 10 percent of its distributors, either of the following disclosures:

(a) a statement of the average or median achieved by all distributors; or

(b) a statement of the percentage of respondents' distributors who have equalled or exceeded the performance indicated during the indicated time period.

If the results achieved by the purchaser are in fact those of only an unrepresentative fraction (we have chosen 10 percent for the sake of clarity and precision) of total purchasers, then we believe it is imperative that consumers be placed on notice in the strongest terms of the unrepresentativeness of the stated performance. A disclosure of average earnings should be sufficient to notify viewers of the full extent of the disparity. If respondents do not wish to compile average figures, then they must make a disclosure which warns in the strongest possible terms of the unrepresentativeness of the purchaser. The alternative disclosure provided would not require any additional recordkeeping on respondents' part, since it requires only a disclosure of the fraction of purchasers who, according to whatever records respondents have chosen to keep, have equalled or exceeded testimonial performance.

On the other hand, if, in fact, the testimonial performance has been equalled or exceeded by a significant fraction of all purchasers then a simple indication that it exceeds the average should be sufficient to convey an accurate impression. This can be accomplished by an actual statement of the average, or a statement of the actual fraction of purchasers who, to respondents' knowledge, have equalled or exceeded the represented performance. Examples of the numerous simple, concise, nondeceptive testimonials which would be permitted by this order are as follows:

1. In 1973, Mary Roe earned $_____ selling VX-6 battery additive in the New York Metropolitan area, spending an average of _____ hours per week on the job. The average earnings for all our purchasers during the same period were $_____.

2. In 1972, John Doe earned $_____ selling VX-6 battery additive in the Philadelphia Metropolitan area, spending an average of _____ hours per week on the job. 15% of all our distributors did as well as or better than John that year.

Paragraph 2 of the order has been modified to require maintenance of substantiation for claims made pursuant to paragraph 1. We have not republished paragraphs 3 through 6 of the original order because those paragraphs have previously become final.

As modified, we believe the order entered herein will permit respondents to make a virtually limitless variety of simple, truthful, nondeceptive statements concerning the earnings of their distributors, while at the same time preventing them from passing off the earnings of unrepresentative samples with no disclosure of their unrepresentativeness. If respondents have evidence that impressive fractions of their distributors have earned goodly sums of money, they should be pleased to disclose the facts. On the other hand, if they lack evidence that more than a small fraction of distributors have earned given amounts, it would be a disservice to consumers to permit the representation of such amounts in advertisements without information to place them in perspective. While absolute clarity and precision in an area of such complexity as that of earnings claims is certainly impossible, we believe the approach adopted herein is in accord with the mandate of the Court of Appeals on remand and sufficient to eliminate the shortcomings of the Commission's order of Mar. 4, 1975.

Because the Commission has modified its earlier order, respondents will, by law, have the full statutory time period within which to appeal the new order. Their request for a 30-day period within which to appeal following our disposition of the motion to reconsider is, therefore, moot.

ORDER GRANTING IN PART PETITION FOR RECONSIDERATION AND MODIFYING ORDER TO CEASE AND DESIST

Complaint counsel have filed a "Petition for Reconsideration" of the Commission's order in this matter issued on Mar. 4, 1975. Respondents have replied in opposition. The Commission has determined upon review of the matter that paragraphs 1 and 2 of its order of Mar. 4, 1975, must be modified, for reasons indicated in the accompanying opinion. Therefore,

It is ordered, That respondents National Dynamics Corporation, a corporation, and its officers, and Elliott Meyer, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of the battery additive VX-6, or of any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1.(a) Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits, or earnings therefrom;

(b) Misrepresenting in any manner the past, present, or future sales, profits or earnings from the resale of respondents' products, or representing, directly or by implication, the past or present sales, profits or earnings of purchasers of respondents' products except that any or all of the following representations shall not be prohibited:

(1) A true statement of the average or median sales, profits, or earnings actually achieved by all purchasers of respondents' products during any stated time period.

(2) A true statement of any particular amount of sales, profits, or earnings actually achieved or exceeded by a substantial number of purchasers of respondents' products during any stated time period, provided that it is accompanied by a clear and conspicuous disclosure (if

printed, in typesize at least equal to that of the statement of sales, profits, or earnings) of the percentage of the total number of purchasers who have achieved such results.

(3) An accurate representation of any range or ranges of sales, profits, or earnings actually achieved by purchasers of respondents' products for any stated period of time. Ranges describing yearly results shall not exceed $4,000 (*e.g.*, $0-4,000; $2,000-6,000; $4,000-8,000). Ranges describing monthly results shall not exceed $350(*e.g.*, $0-350; $350-700) and ranges describing results for any other time period shall not exceed an amount constituting the same percentage of $4,000 as the time period constitutes of one year. A representation of any range or ranges of sales, profits, or earnings achieved by purchasers of respondents' products must include a clear and conspicuous statement (if printed, in typesize at least equal to that of the statement of the range) of the percentage which purchasers achieving results within the range constitute of the entire number of respondents' purchasers; *Provided, however*, That if the ranges employed begin with $0 and proceed continuously upward, a statement of the number of purchasers within each range may be included in lieu of the percentage.

(4) Truthful testimonials regarding the sales, profits, or earnings achieved by a purchaser of respondents' products, provided that any such testimonial includes or is accompanied by the following clear and conspicuous disclosures (if printed, in boldface type at least equal in size to that of any sales, profits, or earnings figure stated in the testimonial):

(i) An accurate statement of the average amount of time per day, week, or month required by the purchaser to achieve the stated results;

(ii) An accurate statement of the year or years during which, and the georgraphical area(s) in which, the stated results were achieved;

(iii) If the results achieved by the purchaser providing the testimonial have not been achieved by at least 10 percent of all purchasers of respondents' products during the time period covered by the testimonial, a statement of the average or median sales (or profits or earnings, whichever is included in the testimonial) of all purchasers of respondents' products during the time period covered by the testimonial, or the following statement: IMPORTANT NOTICE: THE RESULTS DESCRIBED ABOVE ARE SUBSTANTIALLY IN EXCESS OF THE AVERAGE RESULTS ACHIEVED BY ALL OUR DISTRIBUTORS. OUR RECORDS SHOW THAT ONLY ____ % OF OUR DISTRIBUTORS HAVE EQUALLED OR EXCEEDED THE PERFORMANCE DESCRIBED ABOVE DURING THE INDICATED TIME PERIOD; and

(iv) If the results achieved by the purchaser providing the testimonial have been achieved by 10 percent or more of all purchasers of respondents' products during the time period covered by the testimonial, but are in excess of the average or median results achieved by all purchasers, a statement of the percentage of all respondents' distributors who, according to respondents' records, have achieved equal or better results during the same time period, or a statement of the average or median results achieved by all purchasers of respondents' products during the same time period.

2. Failing to maintain records which substantiate that any representation made regarding past or present sales, profits, or earnings are accurate. Such records shall be sufficient to substantiate the accuracy of any representations made regarding amounts earned or sold, the number or percentage of purchasers achieving such results, the time period during which such results are achieved, and the amount of time per day, week, or month required to achieve such results.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents shall notify the Commission at least 30 days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

CORNING GLASS WORKS

AMENDED ORDER TO CEASE AND DESIST IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8874. Complaint, Jan. 13, 1972-Amended Decision, June 17, 1975*

Amended final order to cease and desist prohibiting a Corning, N.Y. manufacturer, advertiser, seller and distributor of Pyrex, Corning Ware, and Corelle Livingware brands of glass household products for food preparation, serving, and storage, among other things, from entering into, maintaining or enforcing resale price agreements; and refusing to deal with customers or potential

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* Complaint reported in 82 F.T.C. 1675.

customers unless they agree to maintain the fair trade price of the commodities to be resold.

Appearances

For the Commission: *Ronald A. Bloch* and *Steven B. Gold.*

For the respondent: *Shearman [Sterling,* New York, N.Y. and *William C. Ughetta,* Corning Glass Works, Corning, N.Y.

ORDER REOPENING PROCEEDINGS, VACATING ORDER, AND ISSUING AMENDED FINAL ORDER TO CEASE AND DESIST

On Apr. 30, 1975, the Commission's order in this matter became final.[1] On that same day, respondent filed a Petition to Reopen the Proceedings to Vacate the Final Order Entered Herein and to Substitute an Amended Final Order and a Motion for Suspension of Compliance with Final Order Pending Disposition of Petition to Vacate Same. Complaint Counsel on behalf of the Bureau of Competition filed their answer to both the Petition and the Motion on May 1, 1975. The Motion to Suspend Compliance was granted in part on May 8, 1975. On May 19, 1975, the parties filed a stipulation as to a modification in respondent's proposed Amended Final Order.

Treating the petition to reopen as a petition to reopen and modify under Rule Section 3.72(b)(2), we find that it should be granted as modified by the stipulation of May 19, 1975.

Under Section 3.72(b), a reopening of a final order is authorized if changed conditions of fact so require. Here, respondent has alleged, and complaint counsel agree, that it has wholly abandoned its fair trade program which was the subject of this matter. We are persuaded that this changed condition of fact and the public interest require a modification of the order entered herein. Accordingly;

It is ordered, That the proceedings in the above-captioned matter be, and they hereby are, reopened.

It is further ordered, That the Commission's order in said matter, issued June 5, 1973, be, and it hereby is, vacated and the following Amended Final Order is hereby entered:

AMENDED FINAL ORDER

I

It is ordered, That respondent, Corning Glass Works, a corporation, directly or indirectly, through its officers, agents, representatives, employees, subsidiaries, successors, licensees, or assigns, or through any reseller or any other corporate or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of Pyrex, Corning Ware, and Corelle brand commodities, or of any other commodity which bears, or the label or container of which bears, any other trademark, brand, or name owned by respondent, with respect to which commodity respondent may in the future establish any fair trade program, shall not:

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[1] The Commission order of June 5, 1973 (82 F.T.C. 1675) was appealed by Corning to the United States Court of Appeals for the Seventh Circuit. The Commission's decision and Order was *affirmed* by that Court, 509 F.2d 293 (Jan. 29, 1975). Under 15 U.S.C. Sec. 45(g)(2), the order thus became final on Apr. 30, 1975.

1. Enter into, maintain or enforce any understanding, contract, or agreement with any reseller located within, or applicable to resales occurring within, any state which at the time is, or thereafter becomes a free trade State;[2]

(a) which contains any provision which establishes, is intended to establish, or may be construed by the reseller to establish, any stipulated or minimum price at which resales shall be made; or which contains any circumstance or condition under which any such provision shall become applicable to any resale; or

(b) which contains any provision which restricts, is intended to restrict, or may be construed by the reseller to restrict, the reseller's right to deal with any customer, whether for subsequent resale or otherwise, in any State; or which otherwise imposes, is intended to impose, or may be construed by the reseller to impose, any qualification, precondition, or other limitation on said right; or which contains any circumstance or condition under which any such provision shall become applicable to any resale.

2. Enter into, maintain, or enforce any understanding, contract or agreement, with any reseller located within any State which at the time is, or thereafter becomes a free trade State, which requires, is intended to require, or may be construed by the reseller to require, as a precondition to any resale or as a qualification or other limitation on the right to resell, that said reseller;

(a) obtain from any customer or potential customer in any State any understanding, contract, or agreement by which said customer or potential customer agrees with respondent to maintain the fair trade price of the commodity to be resold; or

(b) refuse to deal with any customer or potential customer in any State unless such customer or potential customer has agreed to maintain the fair trade price of the commodity to be resold.

3. (a) Circulate to any free trade State reseller any list ("blacklist") of retailers who have advertised, offered for sale, or sold any of

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[2] The definitions of terms contained in Part I.A of the Commission's June 5, 1973 opinion in this matter shall apply to this Amended Final Order.

respondent's fair traded commodities at less than the fair trade prices established therefor, or who have not signed a fair trade contract, or whose retailer contracts have been terminated; or in any other manner communicate the names of such retailers to any free trade State resellers; or (b) take any other action which is intended to, or which may in fact, prevent or have a tendency to prevent any retailer from obtaining any such commodity: *Provided, however*, That nothing in (b) of this subparagraph 3 shall apply to any action taken by virtue of the breach of a signed contract, lawfully obtained and entered into pursuant to a fair trade law which is valid as of the time of both the breach and the action taken; or to any action taken to enforce any right against a nonsigner created by a fair trade law or provision thereof which is enforceable as of the time of the action taken.

4. Impose, by refusing to deal, termination, or any other unilateral action, or by contract, combination or conspiracy, any limitation, qualification, or precondition not expressly permitted by Sections 5(a)(2) and 5(a)(3) of the Federal Trade Commission Act, on any reseller's right or ability to purchase or sell any fair traded commodity;

(a) where the purpose or effect thereof is, or is likely to be, adherence to resale prices or any course of conduct established, required, or suggested by respondent, by any reseller whose resale prices or conduct are not, or cannot be, lawfully controlled by respondent; or

(b) where the purpose or effect thereof is, or is likely to be, the unavailability, through normal channels of distribution, of respondent's commodities to, or any discrimination with respect thereto against, any such reseller due to his failure or unwillingness to adhere to said resale prices or course of conduct.

II

It is further ordered, That respondent, directly or indirectly, through its officers, agents, representatives, employees, subsidiaries, successors, licensees, or assigns, or through any reseller or any other corporate or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any commodity, shall forthwith cease and desist from entering into, maintaining, or enforcing any contract, combination or conspiracy which imposes any limitation, qualification, or precondition not expressly permitted by applicable State law and granted immunity by Section 5(a)(2) of the Federal Trade Commission Act, on any reseller;

1. Where the purpose or effect thereof is or is likely to be, adherence to resale prices or any course of conduct established,

required, or suggested by respondent, by any reseller whose resale prices or conduct are not, or cannot be lawfully controlled by respondent; or

2. Where the purpose or effect thereof is, or is likely to be, the unavailability through normal channels of distribution of respondent's commodities to, or any discrimination with respect thereto against, any such reseller due to his failure or unwillingness to adhere to said resale prices or course of conduct.

III

It is further ordered, That beginning ninety (90) days following the date upon which this order becomes final and continuing for a period of ten (10) years thereafter in connection with the advertising, offering for sale, sale or distribution of any nonfair traded glass and glass ceramic product for food preparation, serving and storage under the names Pyrex and Corning Ware and tableware under the name Corelle, respondent shall not suggest any resale prices either in advertising or in any material provided, published, or paid for in whole or in part by respondent, including but not limited to pricelists, advertising and promotional material, boxes and containers furnished for the transport or display of such commodities and tags, labels and other devices affixed to such commodities, unless such advertising and material include the clear and conspicuous statement "Manufacturer's Suggested Price," or a statement substantially equivalent thereto; *Provided, however*, That nothing in this Paragraph III shall prevent respondent from furnishing or causing to be furnished to resellers of such products any advertising or promotional materials containing respondent's suggested prices without such statement when alternative materials without prices for use by such resellers to advertise or promote prices of their own choosing are simultaneously furnished; and *Provided, further*, That respondent shall not initiate, conduct, sponsor, participate in, or contribute anything of value to, any cooperative advertising or other program of sales promotion or assistance wherein participation therein or the benefits thereof to any reseller are in any way conditioned upon the reseller's advertising, offering for sale or selling at no less than any price(s) suggested by respondent for such products.

IV

It is further ordered, That respondent shall:

1. Within sixty (60) days from the date upon which this order becomes final, mail, deliver or cause to be delivered and request signed receipts for, copies of this order to the following resellers of glass and

glass ceramic products for food preparation, serving and storage under the names Pyrex and Corning Ware and tableware under the name Corelle:

(a) every reseller who was either under fair trade contract on Mar. 1, 1971 or who was placed under such contract thereafter;

(b) every reseller whose fair trade contract has been terminated by respondent since Jan. 1, 1966;

(c) every reseller whose name has appeared on any blacklist since Jan. 1, 1966; and

(d) every other current reseller of such products.

2. Within sixty (60) days from the date upon which this order becomes final, and on the six (6) month and twelve (12) month anniversary date of this order, mail, deliver or cause to be delivered, and request signed receipts for notices in forms submitted to and approved by the Commission prior to mailing or delivery, which clearly inform all resellers specified in subparagraphs 1(a), (b), (c) and (d) of this Paragraph IV:

(a) that respondent has ceased to fair trade its commodities;

(b) that all provisions of their contracts (should the same otherwise be in effect) relating to fair trade are cancelled and that said resellers are under no legal duty to reenter into any fair trade agreements;

(c) that such fair trade provisions will no longer be enforced;

(d) that said resellers may and are encouraged to sell respondent's goods to any customer at such prices as may be individually determined by each such reseller;

(e) that said resellers may and are encouraged to sell respondent's goods to any customer, whether for subsequent resale or otherwise, without restriction or precondition, and irrespective of whether the customer is located within, or may resell the goods within, any fair trade State;

(f) that no resellers in any State are required to refuse to deal with any other reseller due to the other reseller's failure or unwillingness to sign any contract requiring the maintenance of resale prices;

(g) that any reseller in any State who places an order for respondent's goods with any reseller which is not filled due to its having advertised, offered for sale, or sold such goods at less than respondent's suggested resale price or any former stipulated or minimum price, should immediately notify respondent in writing of the name and address of the reseller so refusing to deal;

(h) that the exercise by said resellers of any of their rights previously subject to the fair trade provisions of respondent's fair trade contracts shall in no way prejudice said resellers' ability to obtain or to continue to obtain respondent's merchandise;

(i) that any reseller who believes that respondent is violating any provision of this order, either directly or indirectly (through its wholesalers or otherwise) should set forth the facts and circumstances believed relevant and submit them to: Assistant Director, Division of Compliance, Bureau of Competition, Federal Trade Commission, Washington, D.C. 20580

The first notice required to be mailed or delivered to retailers by this subparagraph 2 shall be accompanied by a list of the names and addresses (arranged by State) of all wholesalers of respondent's goods. Said list shall contain a clear and conspicuous statement that all wholesalers listed therein are free to sell at prices of their own choosing to any retailer in any State without qualification, limitation or precondition.

3. Within sixty (60) days from the date upon which this order becomes final, mail or deliver, and obtain a signed receipt for, a written offer of reinstatement to:

(a) any free trade State wholesaler who was terminated by respondent since Jan. 1, 1966 for failure to comply with the refusal-to-deal provision of his wholesaler contract, and

(b) any free trade State wholesaler who was terminated by respondent since Jan. 1, 1966 for failure to comply with the resale price maintenance provision of his wholesaler contract;

and reinstate forthwith, any such wholesalers who within thirty (30) days thereafter request reinstatement. Said offer of reinstatement shall be accompanied by a copy of this order and the notice required by subparagraph 2 of this Paragraph IV.

4. Immediately upon receipt, take such action as is necessary to ensure correction of all complaints received pursuant to any provision of this Paragraph IV, and retain such complaints and records of all corrective action taken thereon for a period of five years from the date on which each complaint is received. Reports of said complaints and of corrective action shall be included in reports to the Commission required by Paragraph VI 1. of this order.

V

It is further ordered, That respondent shall:

1. Fully acquaint all appropriate present and future personnel with the provisions and requirements of this order.

2. For a period of five (5) years from the date of this order, mail or deliver and obtain a signed receipt for, a copy of this order to all new resellers to whom respondent directly sells glass and glass ceramic products for food preparation, serving, and storage under the names Pyrex and Corning Ware and tableware under the name Corelle.

3. Make any fair trade provisions of contracts entered into by it in the future conform with the requirements and intent of this order and submit any such contracts to the Commission for approval prior to their use.

VI

It is further ordered, That respondent shall:

1. Within sixty (60) days from the date on which this order becomes final, and annually each year for a period of five (5) years thereafter, submit to the Commission a written report setting forth in full detail the manner in which respondent is complying with each requirement of this order, accompanied by such documents, forms, contracts, receipts, or other material as is necessary to constitute proof that respondent is in full and faithful compliance herewith.

2. Notify the Commission in writing at least ninety (90) days prior to the reinstitution by respondent of any future fair trade program and neither execute nor obtain the execution of any new fair trade contract which has not been submitted to and approved by the Commission prior to its use.

3. Notify the Commission in writing at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

4. Retain all receipts required to be obtained by this order for a period of five (5) years from the date of each said receipt.

Commissioner Thompson not participating.

IN THE MATTER OF

MARK ENTERPRISES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8984. Complaint, July 29, 1974-Decision, June 17, 1975

Consent order requiring a Kansas City, Mo., seller and installer of residential, above-the-ground swimming pools and other home improvement products, among other things to cease using bait and switch tactics and other deceptive selling practices.

Appearances

For the Commission: *F. Kelly Smith, Jr.*

For the respondents: *William B. Miller*, Kansas City, Mo., and *Peabody, Revlin, Lambert & Dennison*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Mark Enterprises, Inc., a corporation, also doing business as Marc Enterprises, Inc., and Paul K. Cassidy, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mark Enterprises, Inc., also doing business as Marc Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 3025 Main in the city of Kansas City, State of Mo.

Respondent Paul K. Cassidy is an individual and officer of said corporate respondent. He formulates, directs and controls the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution to the public of products including, but not limited to, residential above ground swimming pools, and in the installation thereof.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents now cause, and for some time last past have caused, their products, when sold, to be shipped from their place of business in the State of Missouri to purchasers thereof located in various other states of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business and for the purpose of inducing the purchase and installation of their residential above ground swimming pools, respondents and their salesmen or representatives have made, and are now making, numerous statements and representations in advertising and promotional material and through oral statements and representations with respect to the nature and limitations of their offers, their prices and their purchasers' savings.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

MARC SAYS:
BRING THE COUNTRY
CLUB HOME
Big Pool — Big Savings!
SUN., MON., TUES.
ONLY
OFFER LIMITED
CALL NOW

* * * * * * *

NOW ONLY,
$649
Installed

* * * * * * *

SAVE an
extra $50
Now!

* * * * * * *

"THE RIVERIA" (sic)
31 feet x 16 feet Outside
Dimensions
15 feet x 24 feet Swim Area
4 feet Deep

PAR. 5. By and through the use of the aforesaid statements and representations and others of similar import and meaning, but not specifically set out herein, separately and in connection with oral statements and representations of their salesmen or representatives, respondents have represented, and are now representing, directly or by implication, that:

1. The offers set out in their advertisements are bona fide offers to sell swimming pools and their installations of the kind therein described at the prices and on the terms stated.

2. Their offer of a 31' x 16' outside dimension swimming pool for $649 is for a limited period of only three days.

3. Their swimming pools and installations are being offered for sale at special or reduced prices, and savings are thereby afforded to their purchasers because of reductions from respondents' regular selling price.

4. Installation of their swimming pools is complete for the advertised price and no other installation work needs to be done.

5. After the installation of their product is complete, the homes of their purchasers will be used for demonstration and advertising purposes by respondents and, as a result of allowing their homes to be used as models, purchasers will be granted reduced prices or will receive allowances or discounts.

PAR. 6. In truth and in fact:

1. The offers set out in respondents' advertisements are not bona fide offers to sell swimming pools and their installations of the kind therein described at the prices or on the terms and conditions stated but are made for purpose of obtaining leads to persons interested in the purchase thereof. After obtaining such leads, respondents' salesmen or representatives call upon such persons and disparage respondents' advertised swimming pools and their installations and otherwise discourage the purchase thereof and attempt to sell and frequently do sell different and more expensive swimming pools and installations.

2. Respondents' advertised offer of a 31' x 16' outside dimension swimming pool for $649 is not made for a limited period of time. Said product is regularly advertised for the represented price or at another so called reduced price over a period of time greater than the represented limitations.

3. Respondents' swimming pools and installations are not being offered for sale at special or reduced prices, and savings are not thereby afforded to their purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices for particular advertised swimming pools, but the prices at which said swimming pools are offered for sale vary from purchaser to purchaser and from month to month.

4. Installation of respondents' swimming pools is not complete for the advertised price. In fact, purchasers are often required to provide some steps in the installation process themselves.

5. After installation of respondents' swimming pools is completed, the homes of respondents' purchasers will not, in most instances, be used for demonstration or advertising purposes by respondents and as a result of allowing, or agreeing to allow their homes to be used as models, purchasers are not granted reduced prices, nor do they receive allowances or discounts of any type.

Therefore, the statements and representations, as set forth in Paragraphs Four and Five hereof, were, and are, false, misleading and deceptive.

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of residential above ground swimming pools of the same general kind and nature as those sold by respondents.

PAR. 8. The use of the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' swimming pools and installations by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued its complaint against the respondents named in the caption hereof, and the respondents having been served with notice of the Commission's complaint charging them with violation of Section 5 of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having decided to withdraw the matter from adjudication, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mark Enterprises, Inc., also doing business as Marc Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with

its office and principal place of business located at 3025 Main, City of Kansas City, State of Missouri.

Respondent Paul K. Cassidy is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That Mark Enterprises, Inc., a corporation, also doing business as Marc Enterprises, Inc., or under any other name, its successors and assigns, and Paul K. Cassidy, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, distribution or installation of residential above-ground swimming pools, or any other home improvement products and services at retail in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of other products, installations or services.

2. Making representations purporting to offer home improvement products, installations or services at retail when the purpose of such representations are not to sell the offered products, installations or services but to obtain leads or prospects for the sale of other such products, installations or services at higher prices.

3. Discouraging the purchase of any swimming pool or other home improvement product, installation or service at retail by failing to deliver as contractually obligated or disparaging any product, installation or service which is advertised or offered for sale by respondents.

4. Representing, directly or by implication, that any home improvement product, installation or service at retail is offered for sale by respondents when such offer is not a bona fide offer to sell such product, installation or service.

5. Representing, directly or by implication, that any of respondents' offers to sell home improvement products, installations or services at retail are limited as to time or restricted or limited in any other manner, unless such represented limitations or restrictions are actually in force and in good faith adhered to.

6. Representing, directly or by implication, that any price for respondents' home improvement products, installations or services at retail is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products, installations or services have been sold in substantial quantities by respondents in the recent regular course of their business; or misrepresenting in any manner their prices or the savings available to their purchasers.

7. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement of swimming pools or other home improvement products was run and for a period of six weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price;

c. the wholesale cost to the respondents of each advertised product or service; and

d. the retail price charged each customer of respondents for the advertised product or service.

8. Using the word "Sale," or any other word or words of similar import or meaning not set forth specifically herein unless the price of said merchandise being offered for sale constitutes a significant reduction from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business.

9. (a) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise at retail, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price, unless such merchandise has been sold or offered for sale in good faith at the former price by respondents for a reasonably substantial period of time in the recent, regular course of their business.

(b) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise at retail, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise at the compared price or some higher price.

(c) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise at retail, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price, and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in their trade area which establishes the validity of said compared price, and it is clearly and conspicuously disclosed that the comparison is with merchandise of like grade and quality.

10. Representing, directly or by implication, that installation of respondents' swimming pools or other home improvement products is included in an advertised or represented price, unless such represented price does actually include such installation.

11. Misrepresenting, orally or in writing, directly or by implication, the efficiency, durability, quality or limitations of said products, services and installations.

12. Representing, directly or by implication, that the home of any of respondents' purchasers or prospective purchasers will be used for any type of advertising or demonstration purpose or as a model home or that as a result of such use, respondents' purchasers or prospective purchasers will be granted reduced prices or will receive discounts or allowances of any type; unless in every instance, the parties to whom such representations are made are offered merchandise or services at a price:

(a) that is significantly less than the price at which identical merchandise or services are offered to those to whom such representations have not been made; and

(b) which constitutes a significant reduction from the price established by sales of a reasonably substantial number of identical items of merchandise or services by the respondents in their recent, regular course of business.

It is further ordered, That respondents shall forthwith deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale or sale of respondents' products, installations or services at retail or in any aspect of preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging the receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

SANFORD INDUSTRIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket 8997. Complaint, Oct. 29, 1974-Decision, June 17, 1975

Consent order requiring a Pompano Beach, Fla., manufacturer and distributor of truss fabricating equipment, connecting plates and the design and sale of engineering services connected therewith, among other things to cease entering into or enforcing agreements which obligate purchasers of equipment to obtain materials and services from sources designated by respondents; offering discounts, rebates, etc. based on amount of purchases from designated sources; and requiring purchasers of equipment to purchase from respondent or its designated sources.

Appearances

For the Commission: *Duncan J. Farmer.*

For the respondents: *Lee, Toomey & Kent,* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. § 41, *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sanford Industries, Inc., a corporation, and A. Carol Sanford, an individual, respondents herein, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45), and Section 3 of the Clayton Act (15

U.S.C. § 14), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating the following:

PARAGRAPH 1. For purposes of this complaint the following definitions shall apply:

A. The term "Sanford" refers to Sanford Industries, Inc., a corporation, and its subsidiaries, affiliates, successors, assigns, officers, agents, representatives and employees, and the term "Mr. Sanford" refers to A. Carol Sanford, an individual.

B. The term "truss fabricating equipment" refers to all machinery and equipment sold, leased, or licensed by Sanford to be used in the assembly, production and construction of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

C. The term "truss connecting plates" refers to all metal plates bearing any number of nails or other sharp devices used to permanently connect the joints of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

D. The term "engineering services" refers to design specification services provided by Sanford in connection with the assembly, production and construction of wood roof trusses, and the selection and designation of truss connecting plates deemed necessary for the proper support of said trusses.

PAR. 2. Respondent Sanford is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal place of business located at 951 Southwest 12th Ave., P. O. Box 1177, Pompano Beach, Fla.

PAR. 3. Respondent Mr. Sanford is an individual and the principal officer of Sanford. He formulates, directs and controls the acts and practices of Sanford, including the acts and practices hereinafter set forth. His business address is the same as that of Sanford.

PAR. 4. Respondent Sanford is now, and for some time last past has been engaged in the manufacture and distribution (by sale, lease and/or license) of truss fabricating equipment; the manufacture and sale of truss connecting plates; and the design and sale of engineering services in connection therewith.

PAR. 5. In the course and conduct of its business, respondent Sanford, under the control and direction of respondent Mr. Sanford, now causes, and has caused in the past, its products and services, when sold, leased, and/or licensed, to be shipped from its place of business in the State of Florida to purchasers, lessees and/or licensees thereof in other states, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Except to the extent that actual and potential competition has been lessened, restricted and restrained by reason of the practices hereinafter alleged, respondent Sanford has been and is now engaged in competition with firms, partnerships, and corporations engaged in the manufacture and distribution of truss fabricating equipment, the manufacture and sale of truss connecting plates, and the design and sale of engineering services.

PAR. 7. In the course and conduct of its business as described above, respondent Sanford, under the control and direction of respondent Mr. Sanford, has offered, entered into and enforced agreements with purchasers, lessees and/or licensees of its truss fabricating equipment which require such purchasers, lessees and/or licensees, as a condition to the purchase, lease or license of truss fabricating equipment from Sanford, to purchase truss connecting plates and/or engineering services from said respondent.

PAR. 8. In the course and conduct of its business as described above, respondent Sanford, under the control and direction of the respondent Mr. Sanford, has offered, entered into and enforced agreements with users of its engineering services which require them, as a condition to the furnishing of engineering services by Sanford, to purchase truss connecting plates from said respondent.

PAR. 9. The effect of the aforesaid agreements has been or may be to substantially lessen competition in the manufacture and sale of truss connecting plates and the design and sale of engineering services.

PAR. 10. The acts, practices and methods of competition alleged herein constitute tying agreements or practices by respondents in violation of Section 3 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereto with violation of Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Act, and the respondents having been served with a copy of that complaint, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter withdrawn this matter from adjudication in accordance with Section 2.34(d) of its rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Sanford Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal place of business located at 951 Southwest 12th Ave., P.O. Box 1177, Pompano Beach, Fla.

2. Respondent Mr. Sanford is an individual and the principal officer of Sanford. He formulates, directs and controls the acts and practices of Sanford. His business address is the same as that of Sanford.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order, the following definitions shall apply:

A. The term "respondents" refers to Sanford Industries, Inc., a corporation, and its subsidiaries, affiliates, successors, assigns, officers, agents, representatives and employees; and to A. Carol Sanford, an individual.

B. The term "truss fabricating equipment" refers to all machinery and equipment sold, leased, or licensed by respondents to be used in the assembly, production and construction of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

C. The term "truss connecting plates" refers to all metal plates bearing any number of nails or other sharp devices used to permanently connect the joints of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

D. The term "engineering services" refers to design specification services provided by respondents in connection with the assembly, production and construction of wood roof trusses, and the selection and designation of truss connecting plates deemed necessary for the proper support of said trusses.

II

It is ordered, That respondents, directly or indirectly through any corporate or other device, in connection with the sale, lease or license of truss fabricating equipment, truss connecting plates and/or engineering services in the United States shall, within thirty (30) days after entry of this order, cease and desist from:

1. Offering, entering into or enforcing any agreement or provision of any agreement, express or implied, which in any way requires or obligates any purchaser, lessee or licensee of respondents' truss fabricating equipment, as a condition to the execution or continuation of a purchase, lease or license agreement with respect to such equipment, to purchase or agree to purchase all or any part of such purchaser's, lessee's or licensee's requirements of truss connecting plates and/or engineering services from respondents or from any source designated by respondents.
2. Offering, allowing or granting a price discount, rental or royalty reduction, rebate, or other valuable consideration on or with respect to the sale, lease or license of respondents' truss fabricating equipment which is in any way based upon purchases of truss connecting plates and/or engineering services from respondents or from any source designated by respondents.
3. Requiring any of its purchasers, lessees or licensees of truss fabricating equipment to purchase truss connecting plates and any other products from respondents or from any source designated by respondents.

III

It is further ordered, That respondent, Sanford Industries, Inc., shall:

1. Within thirty (30) days after entry of this order, mail a letter on its stationery, signed by the officers of the respondent and enclosing a copy of this order, to all of its purchasers, lessees, and/or licensees of truss fabricating equipment who have purchased truss connecting plates from it during the twenty-four (24) months preceding entry of this order which informs each such purchaser, lessee or licensee of the prohibitive terms of this order.
2. Notify, during the five (5) year period after entry of this order, each new prospective purchaser, lessee or licensee of its truss fabricating equipment (excluding replacement parts) of the prohibitive

terms of this order on its first written proposal to each such new prospective purchaser, lessee or licensee.

3. Within ten (10) days after entry of this order, provide a copy of this order to each of its salesmen, sales agents and sales representatives.

4. Within thirty (30) days after entry of this order, and continuing thereafter, make available its manuals concerning its standard wood roof truss designs, including updated standard wood roof truss designs, to any truss fabricator desiring such manuals; nothing contained in this order shall prohibit respondent from charging a reasonable fee for such manuals.

5. Within sixty (60) days after entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

6. Notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IN THE MATTER OF

JOSEPH RICHARD HORVATH T/A SEW RITE

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8999. Complaint, Dec. 4, 1974-Decision, June 17, 1975

Consent order requiring a Springfield, Va., seller and distributor of new and used sewing machines and related products, among other things to cease using bait and switch tactics and other deceptive pricing practices.

Appearances

For the Commission: *Richard G. Day*, and *Richard F. Kelly*.
For the respondent: *Henry Counts, Jr.*, Alexandria, Va.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Joseph Richard Horvath, an individual, trading and doing business as Sew Rite, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Joseph Richard Horvath is an individual trading and doing business as Sew Rite with his office and principal place of business located at 8002-C Haute Court, Springfield, Va. He formulates, directs and controls the acts and practices of said business, including the acts and practices hereinafter set forth.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribtuion of new and used sewing machines and related products to the general public.

PAR. 3. In the course and conduct of his business as aforesaid, respondent has caused, and now causes, advertisements for said sewing machines to appear in newspapers of interstate circulation, which advertisements are designed and intended to induce persons to purchase said sewing machines.

In the course and conduct of his business as aforesaid, respondent, from his place of business in the Commonwealth of Virginia, makes contracts for the sale of sewing machines with persons in the State of Maryland and in the District of Columbia.

In the course and conduct of his business as aforesaid, respondent, through his agents and representatives, transports his merchandise from his place of business in the Commonwealth of Virginia to the homes of purchasers located in the State of Maryland and in the District of Columbia.

Accordingly, respondent has maintained, and now maintains, a substantial course and conduct of business in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his aforesaid business, and in furtherance of a sales program for inducing the purchase of sewing machines, respondent has made, and is now making, numerous statements and representations in advertisements inserted in newspapers of interstate circulation and in other promotional material and by oral statements and representations of his salespersons with respect to his products and services.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

> Zig-Zag Sewing Machine Brand New 1973. Must be disposed of. Orig. price $189. Thursday only $48.88.
>
> Grand Opening Sale! Suggested Retail Price $189.95 Sale Price $58.88
>
> 3-Day Sale at Close Out Prices Plus these Items Free! Comparative Retail Values $498. However Our Price Only $279.

Warehouse Sale at Liquidation Prices! Plus these 10 Items FREE! Comparative Retail Values $498. However Our Price Without Trade In Is Only $289.

'73 SINGER ZIG ZAGS Like new. 5-yr. parts & labor guaranteed. No obligation. Free home demonstration. $38.88. Call Credit Manager, 9-9

PAR. 5. By and through the use of the above quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with oral statements and representations by respondent's salespersons to prospective purchasers of respondent's products, respondent has represented, and is now representing, directly or by implication, that:

1. The zigzag sewing machines offered for $48.88 had been sold, or openly and actively offered for sale, at a price of $189 by the respondent for a reasonably substantial period of time in the recent, regular course of his business.

2. Respondent's sewing machines are being offered for sale at a price reduced from respondent's regular selling price, thereby affording savings to purchasers.

3. The advertised prices are available for only a limited period of time.

4. A bona fide offer is being made to sell the advertised Singer sewing machine at the price and on the terms and conditions stated in the advertisements.

5. Respondent's sewing machines are available at reduced prices because they have been repossessed by respondent or have been forfeited by a layaway purchaser.

6. Purchasers of the advertised Singer sewing machine receive a written guarantee from the Singer Company.

7. The sewing machine offered with "free" merchandise is being offered at its regular price, or less, and the "free" merchandise is not regularly included with the machine at the regular price.

PAR. 6. In truth and in fact:

1. The zigzag sewing machine offered by the respondent for $48.88 had not been sold, or openly and actively offered for sale, at a price of $189 by the respondent for a reasonably substantial period of time in the recent, regular course of his business.

2. Respondent's sewing machines are not being offered for sale at special or reduced prices and savings are not thereby afforded respondent's customers because of a reduction from respondent's regular selling prices. In fact, respondent does not have regular selling prices. The prices at which respondent's sewing machines are sold vary from customer-to-customer depending upon the resistance of the prospective purchaser.

3. Advertised prices are not available for only a limited period of time.

4. A bona fide offer is not being made to sell the advertised Singer sewing machine at the price and on the terms and conditions stated; but said offer is made for the purpose of obtaining leads as to persons interested in purchasing a sewing machine. After obtaining leads through responses to said advertisements, respondent or his salespersons call upon such persons but make no effort to sell the advertised sewing machines. Instead, they exhibit sewing machines which are in such poor condition as to be unusable or undesirable and disparage the advertised product to discourage its purchase and attempt to sell, and frequently do sell, other sewing machines at a much higher price.

5. Respondent's sewing machines are not offered to purchasers at a reduction from respondent's regular selling price as a result of having been repossessed or forfeited by a layaway purchaser. In fact, respondent's sewing machines have no regular selling price. Prices are generally arrived at through negotiation between the buyer and seller.

6. Purchasers of the advertised Singer sewing machines do not receive a written guarantee from the Singer Company.

7. The merchandise offered "free" with the purchase of the sewing machine offered for $279, or $289, is regularly included in the purchase of the machine at that price. When the machine is sold without the ten "free" items it is sold at a price considerably less than $279, or $289.

Therefore, the statements and representations set forth in Paragraphs Four and Five, hereof, were and are false, misleading and deceptive.

PAR. 7. In the further course and conduct of his aforesaid business and in furtherance of a sales program for inducing the purchase of his sewing machines, respondent has engaged in the following additional unfair and deceptive act and practice.

Through the use of false, misleading and deceptive statements and representations as set forth in Paragraphs Four through Six hereof, respondent and his salespersons have induced members of the general public to purchase respondent's sewing machines at a cost of up to several hundred dollars each without allowing such persons adequate time to consider the offer and reflect upon the merits of the offer and the effect of the expense upon their financial situation.

PAR. 8. In the course and conduct of his aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of products of the same general kind and nature as those sold by respondent.

PAR. 9. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of the respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY HARRY R. HINKES, ADMINISTRATIVE LAW JUDGE

MARCH 31, 1975

PRELIMINARY STATEMENT

Pursuant to a complaint issued by the Commission on Dec. 4, 1974, respondent Joseph Richard Horvath, doing business as Sew Rite, was charged with unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Said complaint was served on respondent's attorney of record on Jan. 31, 1975, but no answer or other response has been received although an answer was required within 30 days of service.

Section 3.12(c) of the Commission's Rules of Practice provides as follows:

> Failure of the respondent to file an Answer within the time provided shall be deemed to constitute a waiver of his right to appear and contest the allegations of the complaint and to authorize the Administrative Law Judge, without further Notice to the respondents, to find the facts to be as alleged in the Complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

Pursuant to said rule, complaint counsel on Mar. 7, 1975, moved that respondent be held in default for failure to file an answer. Although this motion was served on Mar. 12, 1975, no response to said motion has been made by respondent. Accordingly, complaint counsel's motion is granted and the following findings, conclusions and order are made.

FINDINGS OF FACT

PARAGRAPH 1. Respondent Joseph Richard Horvath is an individual trading and doing business as Sew Rite with his office and principal place of business located at 8002-C Haute Court, Springfield, Va. He formulates, directs and controls the acts and practices of said business, including the acts and practices hereinafter set forth.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of new and used sewing machines and related products to the general public.

PAR. 3. In the course and conduct of his business as aforesaid, respondent has caused, and now causes, advertisements for said sewing machines to appear in newspapers of interstate circulation, which advertisements are designed and intended to induce persons to purchase said sewing machines.

In the course and conduct of his business as aforesaid, respondent, from his place of business in the Commonwealth of Virginia, makes contracts for the sale of sewing machines with persons in the State of Maryland and in the District of Columbia.

In the course and conduct of his business as aforesaid, respondent, through his agents and representatives, transports his merchandise from his place of business in the Commonwealth of Virginia to the homes of purchasers located in the State of Maryland and in the District of Columbia.

Accordingly, respondent has maintained, and now maintains, a substantial course and conduct of business in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his aforesaid business, and in the furtherance of a sales program for inducing the purchase of sewing machines, respondent has made, and is now making, numerous statements and representations in advertisements inserted in newspapers of interstate circulation and in other promotional material and by oral statements and representations of his salespersons with respect to his products and services.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

> Zig-Zag Sewing Machine Brand New 1973. Must be disposed of. Orig. price $189. Thursday only $48.88.
>
> Grand Opening Sale! Suggested Retail Price $189.95 Sale Price $58.88
>
> 3-Day Sale at Close Out Prices Plus these Items Free! Comparative Retail Values $498. However Our Price Only $279.
>
> Warehouse Sale at Liquidation Prices! Plus these 10 Items FREE! Comparative Retail Values $498. However Our Price Without Trade In Is Only $289.
>
> '73 SINGER ZIG ZAGS Like new. 5-yr. parts & labor guaranteed. No obligation. Free home demonstration. $38. Call Credit Manager, 9-9.

PAR. 5. By and through the use of the above quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with oral statements and representations by respondent's salespersons to prospective purchasers of respondent's products, respondent has represented, and is now representing, directly or by implication, that:

1. The zigzag sewing machines offered for $48.88 had been sold, or openly and actively offered for sale, at a price of $189 by the respondent for a reasonably substantial period of time in the recent, regular course of his business.

2. Respondent's sewing machines are being offered for sale at a price reduced from respondent's regular selling price, thereby affording savings to purchasers.

3. The advertised prices are available for only a limited period of time.

4. A bona fide offer is being made to sell the advertised Singer sewing machine at the price and on the terms and conditions stated in the advertisements.

5. Respondent's sewing machines are available at reduced prices because they have been repossessed by respondent or have been forfeited by a layaway purchaser.

6. Purchasers of the advertised Singer sewing machine receive a written guarantee from the Singer Company.

7. The sewing machine offered with "free" merchandise is being offered at its regular price, or less, and the "free" merchandise is not regularly included with the machine at the regular price.

PAR. 6. In truth and in fact:

1. The zigzag sewing machine offered by the respondent for $48.88 had not been sold, or openly and actively offered for sale, at a price of $189 by the respondent for a reasonably substantial period of time in the recent, regular course of his business.

2. Respondent's sewing machines are not being offered for sale at special or reduced prices and savings are not thereby afforded respondent's customers because of a reduction from respondent's regular selling prices. In fact, respondent does not have regular selling prices. The prices at which respondent's sewing machines are sold vary from customer-to-customer depending upon the resistance of the prospective purchaser.

3. Advertised prices are not available for only a limited period of time.

4. A bona fide offer is not being made to sell the advertised Singer sewing machine at the price and on the terms and conditions stated; but said offer is made for the purpose of obtaining leads as to persons interested in purchasing a sewing machine. After obtaining leads through responses to said advertisements, respondent or his salespersons call upon such persons but make no effort to sell the advertised sewing machines. Instead, they exhibit sewing machines which are in such poor condition as to be unusable or undesirable and disparage the

advertised product to discourage its purchase and attempt to sell, and frequently do sell, other sewing machines at a much higher price.

5. Respondent's sewing machines are not offered to purchasers at a reduction from respondent's regular selling price as a result of having been repossessed or forfeited by a layaway purchaser. In fact, respondent's sewing machines have no regular selling price. Prices are generally arrived at through negotiation between the buyer and seller.

6. Purchasers of the advertised Singer sewing machines do not receive a written guarantee from the Singer Company.

7. The merchandise offered "free" with the purchase of the sewing machine offered for $279, or $289, is regularly included in the purchase of the machine at that price. When the machine is sold without the ten "free" items it is sold at a price considerably less than $279, or $289.

Therefore, the statements and representations set forth in Paragraphs Four and Five, hereof, were and are false misleading and deceptive.

PAR. 7. In the further course and conduct of his aforesaid business and in furtherance of a sales program for inducing the purchase of his sewing machines, respondent has engaged in the following additional unfair and deceptive act and practice.

Through the use of false, misleading and deceptive statements and representations as set forth in Paragraphs Four through Six hereof, respondent and his salespersons have induced members of the general public to purchase respondent's sewing machines at a cost of up to several hundred dollars each without allowing such persons adequate time to consider the offer and reflect upon the merits of the offer and the effect of the expense upon their financial situation.

PAR. 8. In the course and conduct of his aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of products of the same general kind and nature as those sold by respondent.

PAR. 9. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of the respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and

practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent Joseph Richard Horvath, an individual, trading and doing business as Sew Rite or under any other name or names, and respondent's agents, representatives and employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of sewing machines, or any other product or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Using the words "orig. price," or any other word or words of similar import or meaning but not specifically set forth herein, to refer to any price at which respondent has offered any product or service to the public, if such price is in excess of the price at which such product or service has been sold, or offered for sale in good faith, to the public, by the respondent, for a reasonably substantial period of time in the recent, regular course of his business and unless respondent's business records establish that said price is the price at which such product or service has been sold, or offered for sale in good faith, to the public, by the respondent, for a reasonably substantial period of time in the recent, regular course of his business.

2. Using the word "Sale," or any other word or words of similar import or meaning but not specifically set forth herein, to refer to any offering of a product or service for sale unless the price for such product or service being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the price at which such product or service has been sold, or offered for sale in good faith, to the public, by the respondent, for a reasonably substantial period of time in the recent, regular course of his business.

3. (a) Representing, in any manner, that by purchasing any product or service, customers are afforded savings amounting to the difference between respondent's stated price and respondent's former price, unless such product or service has been sold, or offered for sale in good faith, to the public, by the respondent, at the former price for a reasonably substantial period of time in the recent, regular course of his business.

(b) Representing, in any manner, that by purchasing any product or service, customers are afforded savings amounting to the difference between respondent's stated price and a compared price for said product or service in respondent's trade area, unless a substantial number of the principal retail outlets in respondent's trade area regularly sell said product or service at the compared price, or a higher price.

(c) Representing, in any manner, that by purchasing any product or service, customers are afforded savings amounting to the difference between respondent's stated price and a compared value price for comparable products or services, unless substantial sales of products of like grade and quality or similar services are being made in respondent's trade area at the compared price, or a higher price, and unless respondent has in good faith conducted a market survey, or obtained a similar representative sample of prices, in his trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with a product of like grade and quality or with a similar service.

4. Misrepresenting, in any manner, the savings afforded to purchasers of respondent's products or services or the prices charged for the same products or services or for products or services of like grade quality by any seller.

5. Making any representation, orally or in writing, directly or by implication, concerning any reduction in price for any of respondent's products or services, or concerning any possible saving available to purchasers of respondent's products or services, including, but not limited to, the use of the words "Sale," "Special," "Regularly," "Originally," "Value," "Save" or any other word or words of similar import and meaning but not specifically set forth herein, without clearly and conspicuously disclosing in close proximity to such representation:

(a) the make and model name or number of the product being offered;

(b) the cash price at which such product or service is being offered;

(c) the cash price at which such product or service has been sold, or offered for sale in good faith, to the public, by the respondent, for a reasonably substantial period of time in the recent, regular course of his business, when the comparison is being made with respondent's former price. When such price representation is in writing, the above disclosure shall be made in bold face type of a minimum size of 8 points.

6. Representing, orally or in writing, directly or by implication, that any offer to sell a product or service is limited or restricted as to time or is limited or restricted in any manner, unless the represented limitation or restriction is imposed and adhered to in good faith by the respondent.

7. Representing, orally or in writing, directly or by implication, that any product or service is offered for sale when such is not a bona fide offer to sell said product or service.

8. Advertising, or offering for sale, any product or service for the purpose of obtaining leads to potential purchasers of different products or services, unless the advertised, or offered, product or service is capable of adequately performing its intended function and respondent maintains an adequate and readily available stock of said product and is willing and able to perform said service.

9. Disparaging in any manner, or refusing to sell, any advertised product or service.

10. The use of any policy, sales plan or method of compensation for salespersons which has the effect, in any manner, of discouraging salespersons from selling, or has the effect of penalizing salespersons for selling, advertised products or services.

11. Using any advertisement, sales plan or procedure which involves the use of any false, misleading or deceptive statement, representation or illustration designed to obtain leads to potential purchasers of respondent's products or services.

12. Representing, orally or in writing, directly or by implication, that any product was left in layaway, was repossessed, or that it is being offered for the balance of the purchase price which was unpaid by a previous purchaser, unless the specific product in each instance was left in layaway, was repossessed or is offered for the balance of the unpaid purchase price, as represented.

13. Misrepresenting, in any manner, the status, kind, quality or price of any product or service being offered.

14. Representing, orally or in writing, directly or by implication, that respondent's products or services are guaranteed unless the nature, extent and duration of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and unless respondent promptly and fully performs all of his obligations directly or impliedly represented, under the terms of each such guarantee.

15. Representing, orally or in writing, directly or by implication, that any price is respondent's regular price for any product or service, unless such price is the price at which such product or service has been sold, or offered for sale in good faith, to the public, by the respondent, for a reasonably substantial period of time in the recent, regular course of his business, and not for the purpose of establishing fictitious higher prices upon which a deceptive comparison or a "free" or similar offer might be based.

16. Representing, orally or in writing, directly or by implication, that a purchaser of respondent's products or services will receive any "free" merchandise, service, gift, prize or award, unless all conditions, obligations, or other prerequisites to the receipt and retention of such

are clearly and conspicuously disclosed at the outset in close conjunction with the word "free" wherever it first appears in each advertisement or offer.

17. Representing, orally or in writing, directly or by implication, that any product or service is furnished "free" or at no cost to the purchaser of an advertised product or service when, in fact, the cost of such product or service is regularly included in the selling price of the advertised product or service.

18. Representing, orally or in writing, directly or by implication, that a "free" offer is being made in connection with the introduction of a new product or service offered for sale at a specified price unless the respondent expects, in good faith, to discontinue the offer after a limited time and commence selling such product or service separately at the same price at which it was sold with a "free" offer.

19. Representing, orally or in writing, directly or by implication, that a product or service is being offered "free" with the sale of a product or service which is usually sold at a price arrived at through bargaining, rather than at a regular price, or where there may be a regular price but where other material factors such as quantity, quality, or size are arrived at through bargaining.

20. Representing, orally or in writing, directly or by implication, that a "free" offer is available in a trade area for more than six (6) months in any twelve (12) month period. At least thirty (30) days shall elapse before another such "free" offer is made in the same trade area. No more than three (3) such "free" offers shall be made in the same trade area in any twelve (12) month period. In such period, respondent's sales of the product or service in the amount, size or quality promoted with the "free" offer in any trade area shall not exceed 50 percent of his total volume of sales of the product or service in the same amount, size or quality in that trade area.

21. Representing, orally or in writing, directly or by implication, that a product or service is being offered as a "gift," as a "bonus" or "without charge," or by other words or terms which tend to convey the impression to the consuming public that the product or service is free, when the use of the term "free" in relation thereto is prohibited by the provisions of this order.

22. (a) Contracting for any sale, whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise, which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

(b) Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services, a fully completed copy of the sales contract, or a fully completed receipt in the event of a cash sale, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller and which includes, in immediate proximity to the space reserved in the contract for the signature of the buyer, or on the front page of the receipt if a contract is not used, and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FOR AN EXPLANATION OF THIS RIGHT.

(c) Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and shall be easily detachable therefrom, and which shall contain in 10 point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the sales contract:

NOTICE OF CANCELLATION

(enter date of transaction)
(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE. IF YOU CANCEL, AND PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED. IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK. IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT. TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO *(name of seller)* AT *(address of seller's place of business)* NOT LATER THAN MIDNIGHT OF *(date)* I HEREBY CANCEL THIS TRANSACTION.

____
(Date)

____
(Buyer's signature)

(d) Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

(e) Including in any sales contract or receipt any confession of judgment or any waiver of the rights to which the buyer is entitled under this provision including, specifically, his right to cancel the sale in accordance with this provision.

(f) Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

(g) Misrepresenting, in any manner, the buyer's right to cancel.

(h) Failing, or refusing, to honor any valid notice of cancellation by a buyer and failing, within ten (10) business days after the receipt of such notice, to: (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

(i) Negotiating, transferring, selling, or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

(j) Failing, within ten (10) business days of receipt of the buyer's notice of cancellation, to notify the buyer whether the seller intends to repossess or to abandon any shipped or delivered goods.

Provided, however, That nothing contained in this provision shall relieve respondent of any additional obligation respecting contracts required by federal law or the law of the State in which the contract is made. When such obligations are inconsistent with this provision respondent may apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon showing, shall make such modifications as may be warranted in the premises.

It is further ordered, That respondent shall forthwith cease and desist from:

(a) Failing to retain, for a period of not less than two (2) years from the date of their last use, a copy of each advertisement and item of promotional material, including, but not limited to, each newspaper advertisement, radio or television script, direct mail advertisement and product brochure, used for the purpose of obtaining leads to prospective purchasers of respondent's products and services or in promoting the sale of respondent's products and services.

(b) Failing to retain, for a period of not less than two (2) years following each price reduction or savings claim, including, but not limited to, each claim of the types described in Paragraphs 1 through 8 of this order, adequate records to substantiate each such claim.

(c) Failing to produce, for the purpose of examination and copying by representatives of the Federal Trade Commission, those records required to be retained by this order.

It is further ordered, That respondent shall forthwith deliver a copy of this order to cease and desist, and a copy of the Commission's news release setting forth the terms of the order, to each advertising agency and advertising medium, such as newspaper publishing company, radio station or television station, presently utilized in the course of his business, and that respondent shall immediately upon opening an account deliver a copy of this order and such news release to any such agency or medium with which he subsequently opens an account.

It is further ordered, That respondent shall forthwith deliver a copy of this order to cease and desist to each of his agents, representatives and employees engaged in the offering for sale or sale of respondent's products or services, in the consummation of any extension of consumer credit or in any aspect of the creation, preparation or placing of respondent's advertisements and that respondent shall deliver a copy of this order to each such person whom he subsequently employs, immediately upon employing such person, and that respondent shall secure from each such person a signed statement acknowledging receipt of a copy of this order.

It is further ordered, That respondent shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's new business address and a statement as to the nature of the new business or employment in which he is engaged as well as a description of his new duties and responsibilities.

FINAL ORDER

The administrative law judge filed his initial decision in this matter on Mar. 31, 1975, finding respondent to have engaged in the acts and practices as alleged in the complaint and entering a cease and desist order against respondent. A copy of the initial decision and order was served on respondent on May 7, 1975. No appeal was taken from the initial decision.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision should become effective as provided in Section 3.51(a) of the Commission's Rules of Practice,

It is ordered, That the initial decision and order contained therein shall become effective on the date of issuance of this order.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon him, file with the Commission a report in writing, signed by such respondent, setting forth in detail the manner and form of his compliance with the order to cease and desist.

IN THE MATTER OF

ASSOCIATED DRY GOODS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2674. Complaint, June 18, 1975-Decision, June 18, 1975

Consent order requiring a New York City parent and its department store operation, Lord & Taylor, among other things to provide charge customers having credit balances with periodic statements setting forth credit balances, no less than three times in a six-month period following creation of the balance; to notify charge account customers with credit balances of their right to a cash refund of the balance; to stop deleting credit balances of $1.00 or more from a customer's account before making a cash refund or an offsetting purchase has been made; to automatically refund amounts of unclaimed credit balances after a period of account inactivity; and to refund all unclaimed credit balances more than $1.00 created since June 30, 1972.

Appearances

For the Commission: *Alan D. Reffkin, Justin Dingfelder*, and *Howard F. Daniel.*

For the respondents: *M. Wade Kimsey, Gould & Wilkie*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Associated Dry Goods Corporation, a corporation, and its division Lord & Taylor, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Associated Dry Goods Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its principal office and place of business located at 417 Fifth Ave., New York, N.Y. Respondent Associated Dry Goods Corporation formulates, controls and directs the policies, acts and practices, including those hereinafter set forth, of its division, Lord & Taylor.

Respondent Lord & Taylor is a division of Associated Dry Goods Corporation. Its principal office and place of business is located at 424 Fifth Ave., New York, N.Y.

PAR. 2. Respondent Associated Dry Goods Corporation, through its operating division Lord & Taylor operates and controls a number of retail specialty clothing stores in nine States and the District of Columbia.

PAR. 3. Respondents sell and distribute merchandise in commerce by operating and controlling retail specialty clothing stores in a number of States and by causing merchandise to be shipped from their warehouses and from the places of business of their various suppliers to their warehouses and retail specialty clothing stores for distribution to and purchase by the general public located in States other than those from which such shipments originate. By these and other acts and practices, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in merchandise and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of their aforesaid business, respondents permit customers of Lord & Taylor, who qualify for credit to charge purchases in accordance with the terms of charge account agreements executed between said customers and respondents. On occasion a customer's charge account balance represents an amount of money owed to the customer by respondents, rather than an amount of money owed to respondents by the customer. This credit balance is the result of, among other things, overpayments by the customer or credits for returned merchandise.

PAR. 5. Respondents customarily provide each customer having a charge account credit balance a monthly statement setting forth the amount of the credit balance, at the end of the billing cycle during which the credit balance is created and at the end of each subsequent billing cycle during which the credit balance has not been cleared from the customer's account and a transaction on the customer's account occurs. No such statements are furnished for any billing cycle during which the customer transacts no business on his account.

If a customer with a credit balance on his charge account does not specifically request that respondents pay him the amount of his credit balance but purchases merchandise or services on his charge account, respondents for a limited time apply the amount of the credit balance to reduce or eliminate the customer's obligation created by the purchase of merchandise or services.

If the customer does not request a refund in cash of the amount of the credit balance or make a purchase within a period of time allowed by respondents for activity to occur on the customer's account, respondents, through bookkeeping entries, clear the amount of the credit balance from the customer's charge account. No cash payment to the customer is made at the time of the clearing of his credit balance from his charge account. Subsequent periodic statements are not mailed until a later purchase is made. The outstanding credit balance that was previously reflected on a periodic billing statement is not applied to any purchase occurring after the credit balance has been cleared from the customer's account.

At no time is the customer informed of his right to receive a cash refund nor do respondents voluntarily refund cash representing outstanding credit balances without a specific customer request. Respondents have through such acts and practices eliminated substantial dollar amounts of credit balances as aforesaid from customer accounts in a substantial number of instances.

PAR. 6. By failing to notify customers with charge account credit balances that they have the right to request and receive cash payment of the amounts of their credit balances; by failing to furnish customers, at the end of each and every billing cycle during which credit balances remain outstanding, monthly statements reflecting the amount of their credit balances; by deleting outstanding credit balances from accounts without refunding such amounts and by providing billing statements for subsequent purchases which do not reflect such outstanding credit balances, respondents have caused a substantial number of their customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondents set forth in Paragraphs Five and Six above were and are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedures prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Associated Dry Goods Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of Commonwealth of Virginia, with its offices and principal place of business located at 417 Fifth Ave., New York, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent, Associated Dry Goods Corporation, a corporation, and its division Lord & Taylor (hereinafter collectively referred to as respondent), their successors and assigns and their representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer open end credit accounts or other retail consumer charge accounts (including but not necessarily limited to thirty (30) day charge accounts) created incident to the business of selling consumer merchandise and services at retail, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to provide each charge account customer having a credit balance created after the date of entry of this order with a periodic

statement setting forth such credit balance, no fewer than three times during the six month period following creation of the credit balance.

2. Failing to notify each charge account customer having a credit balance created after the date of entry of this order of the right to request and receive a cash refund in the amount of such credit balance. Such notice shall accompany, or be made on, the periodic statement required by Paragraph One hereof and shall contain a clear and conspicuous disclosure of the following facts, to the extent applicable: the amount of the credit balance (unless shown on the accompanying periodic statement); the credit balance represents money owed to the customer; the customer's right to make purchases against such balance or to obtain a cash refund of such balance by presenting such periodic statement at respondent's store or by returning the statement to respondent in an envelope which respondent shall enclose with the statement for that purpose; a check will be mailed automatically after six months if no charge is made against the credit or a refund is not requested. In addition to the above requirements each periodic statement required by Paragraph One shall state clearly and conspicuously: "a credit balance of one dollar ($1.00) or less will not be refunded unless specifically requested, and it will not be credited against future purchases after this period." Such statement need not be made in the event that is the store's policy to refund without request all amounts of less than one dollar.

3. Writing off or deleting any credit balance of more than one dollar ($1.00) created after the date of entry of this order from a customer's account before respondent has made a cash refund or the customer has made a fully offsetting purchase, unless such credit balance is not in fact owed to the customer, or unless respondent has complied with the requirements of Paragraph B below.

4. Failing to refund to each charge account customer with a credit balance of more than one dollar ($1.00) created after the date of entry of this order the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive billing cycle during which the credit balance exists and the customer neither transacts any business on his account nor requests a refund, unless such credit balance is not in fact owed to the customer.

A. *It is further ordered*, That with respect to each credit balance owed a customer in the amount of more than one dollar ($1.00) which was created at any time since June 30, 1972, and which has not been refunded to the customer as of the date of entry of this order, respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for compliance herewith; *Provided, however,* That nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s) in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s), or an accompanying notice attached to the certificate, shall.clearly and conspicuously disclose that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent shall comply with the provisions of this paragraph no later than three (3) months after the date of entry of this order, and the report required by Paragraph F of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered,* That each refund shall be given to the customer either in person or by mailing a check (or a credit certificate(s) in the case of credit balances existing prior to the date of entry of this order) payable to the order of the customer at the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address shown in respondent's records. In the event that any such statement or check (or credit certificate(s) is returned to respondent with a notification to the effect that the addressee is not located at the address to which it was sent, respondent shall remail the check or statement (or credit certificate(s)). If a check or statement (or credit certificate(s)) which has been mailed is returned to respondent, the full amount of the credit balance shall be reinstated on the customer's account to be retained for one year from the date on which the remailed check or statement (or credit certificate(s)) was returned so that offsetting purchases can be made. Thereafter respondent shall be relieved of any further obligation to send any additional notice and/or any refund with respect to the credit balance in question; *Provided, however,* That in the event said customer should subsequently request a refund of any such credit balance owed the customer, respondent shall promptly make such refund.

C. *It is further ordered,* That if a customer requests, in person or by mail, a refund of a credit balance in any amount which had been reflected at any time on such customer's account, respondent shall, within thirty (30) days of receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with a written explanation, with supporting documentation when available, of the reason(s) for refusing to refund the amount requested.

D. *It is further ordered,* That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered*, That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balance on accounts administered by third parties.

F. *It is further ordered*, That respondent shall, within sixty (60) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

G. *It is further ordered*, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IN THE MATTER OF

GIMBEL BROTHERS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2675. Complaint, June 18, 1975-Decision, June 18, 1975

Consent order requiring a New York City parent and its department store operation, Gimbels New York, among other things to provide charge customers having credit balances with periodic statements setting forth credit balances, no less than three times in a six-month period following creation of the balance; to notify charge account customers with credit balances of their right to a cash refund of the balance; to stop deleting credit balances of $1.00 or more from a customer's account before making a cash refund or an offsetting purchase has been made; to automatically refund amounts of unclaimed credit balances after a period of account inactivity; and to refund all unclaimed credit balances more than $1.00 created since June 30, 1972.

Appearances

For the Commission: *Alan D. Reffkin*, *Justin Dingfelder*, and *Howard F. Daniel*.

For the respondents: *Eugene H. Gordon*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Gimbel Brothers, Inc., a corporation, and its divisions, Gimbels New York, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Gimbel Brothers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 1275 Broadway, New York, N.Y. Respondent Gimbel Brothers, Inc. has the legal authority to formulate, control and direct the policies, acts and practices, including those hereinafter set forth, of its division Gimbels New York.

Respondent Gimbels New York is a division of Gimbel Brothers, Inc. Its principal office and place of business is located at 1275 Broadway, New York, N.Y.

PAR. 2. Respondent Gimbel Brothers, Inc., through operating divisions and a wholly-owned subsidiary, operates and controls a number of retail department and apparel stores in 14 states.

Respondent Gimbels New York operates approximately 11 department stores in three States.

PAR. 3. Respondents sell and distribute merchandise in commerce by operating and controlling retail department stores in a number of States and by causing merchandise to be shipped from their warehouses and from the places of business of their various suppliers to their warehouses and retail department stores for distribution to and purchase by the general public located in states other than those from which such shipments originate. By these and other acts and practices, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in merchandise and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of their aforesaid business, respondents permit customers of Gimbels New York who qualify for credit to charge purchases in accordance with the terms of charge account agreements executed between said customers and respondents. On occasion a customer's charge account balance represents an amount of money owed to the customer by respondents, rather than an amount of money owed to respondents by the customer. This credit balance is the result of, among other things, overpayments by the customer or credits for returned merchandise.

5. Respondents customarily provide each customer having a charge account credit balance a monthly statement setting forth the amount of the credit balance, at the end of the billing cycle during which the credit balance is created and at the end of each subsequent billing cycle during which the credit balance has not been cleared from the customer's account and a transaction on the customer's account occurs. No such statement is provided for any billing cycle during which a customer does not transact any business on his charge account.

If a customer with a credit balance on his charge account does not specifically request that respondents pay him the amount of his credit balance but purchases merchandise or services on his charge account, respondents for a limited time apply the amount of the credit balance to reduce or eliminate the customer's obligation created by the purchase of merchandise or services.

If the customer does not request a refund in cash of the amount of the credit balance or make a purchase within a period of time allowed by respondents for activity to occur on the customer's account, respondents, through bookkeeping entries, clear the amount of the credit balance from the customer's charge account. No cash payment to the customer is made at the time of the clearing of his credit balance from his charge account. Subsequent periodic statements are not mailed until a later purchase is made. The outstanding credit balance that was previously reflected on a periodic billing statement is not applied to any purchase occurring after the credit balance has been cleared from the customer's account.

At no time is the customer informed of his right to receive a cash refund nor do respondents voluntarily refund cash representing outstanding credit balances without a specific customer request. Respondents have through such acts and practices eliminated substantial dollar amounts of credit balances as aforesaid from customer accounts in a substantial number of instances.

PAR. 6. By failing to notify customers with charge account credit balances that they have the right to request and receive cash payment of the amounts of their credit balances; by failing to furnish customers, at the end of each and every billing cycle during which credit balances remain outstanding, monthly statements reflecting the amount of their credit balances; by deleting outstanding credit balances from accounts without refunding such amounts and by providing billing statements for subsequent purchases which do not reflect such outstanding credit balances, respondents have caused a substantial number of their customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondents set forth in Paragraphs Five and Six above were and are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedures prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Gimbel Brothers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 1275 Broadway, New York, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Gimbel Brothers, Inc., a corporation, and its division, Gimbels New York (hereinafter collectively referred to as respondent), their successors and assigns and their representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer open end credit accounts or other retail consumer charge accounts (including, but not necessarily limited to thirty (30) day charge accounts) created incident to the business of selling consumer merchandise and services at retail, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to provide each charge account customer having a credit balance created after the date of entry of this order with a periodic statement setting forth such credit balance no fewer than three times during the six month period following the creation of the credit balance.

2. Failing to notify each charge account customer having a credit balance created after the date of entry of this order of the customer's right to request and receive a cash refund in the amount of such credit balance. Such notice shall be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement; shall be accompanied by a return envelope, and shall be consistent with but need not be identical to the following:

NO PAYMENT REQUIRED

The Credit Balance shown on [this] [the enclosed] statement represents money we owe you. You may obtain a refund by presenting your statement at our store or by returning it in the enclosed envelope.

If you do not charge against this credit or request a refund, a check will be mailed to you automatically after six months, except a credit balance of one dollar or less will not be refunded unless specifically requested, and it will not be credited against future purchases after this period.

Such disclosure need not be made by respondent in the event that it is respondent's policy to refund automatically and without request all credit balances regardless of amount. In such case a disclosure consistent with but not necessarily identical to the following must be made:

Contact any store for refund or you may purchase against the balance. If you do neither, refund will be made after 6 months.

3. Writing off or deleting any credit balance of more than one dollar ($1.00) created after the date of entry of this order from a customer's account before respondent has made a cash refund or the customer has made a fully offsetting purchase, unless such credit balance is not in fact owed to the customer, or unless respondent has complied with the requirements of Paragraph B below.

4. Failing to refund to each charge account customer with a credit

balance of more than one dollar created after the date of entry of the order the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive billing cycle during which the credit balance exists and the customer neither transacts any business on his account nor requests a refund, unless such credit balance is not in fact owed to the customer.

A. *It is further ordered*, That with respect to each credit balance owed to a customer in the amount of more than one dollar ($1.00) which was created at any time since June 30, 1972, and which has not been refunded to the customer as of the date of entry of the order, respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for compliance herewith; *Provided, however*, That nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s) in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s), or an accompanying notice attached to the certificate, shall clearly and conspicuously disclose that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent shall comply with the provisions of this paragraph no later than three (3) months after the date of entry of this order, and the report required by Paragraph F of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered*, That each refund shall be given to the customer either in person or by mailing a check (or a credit certificate(s) in the case of credit balances existing prior to the date of entry of this order) payable to the order of the customer to the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer to the last known address shown in respondent's records for such customer. In the event that any such statement, check or credit certificate(s) is mailed without an address correction request to the Post Office and is subsequently returned to respondent with a notification to the effect that the customer to whom it was mailed is not located at the address to which it was sent, respondent shall remail the check, credit certificate(s) or statement with an address correction request to the Post Office. If any such check, credit certificate(s) or statement which has been mailed with an address correction request to the Post Office is returned to respondent and represents an amount of twenty-five dollars ($25.00) or more, respondent shall employ one of the following procedures to locate the customer: contacting a credit bureau; employing an independent contractor engaged in the business of skip-locating; contacting the customer's last known employer as shown in respondent's records; or reinstating the full amount of the credit balance on the customer's account and retaining it in such account for one year from the date on which the remailed check, certificate(s) or statement is returned so that offsetting purchases can be made. If any such check, credit certificate(s) or statement which has been mailed with an address correction request to the Post Office is returned to respondent and represents an amount of less than twenty-five dollars ($25.00), respondent shall not be required to take any of the additional actions set forth in the preceding sentence. Thereafter, respondent shall be relieved of any further obligation to send any additional notice and/or any refund with respect to the credit balance in question; *Provided, however*, That in the event said customer should subsequently request a refund of any such credit balance owed the customer, respondent shall treat such request in the manner provided in Paragraph C.

C. *It is further ordered*, That if a customer requests, in person or by mail, a refund of a credit balance in any amount which had been reflected at any time on such customer's account, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with a written explanation, with supporting documentation, when available, of the reason(s) for refusing to refund the amount requested.

D. *It is further ordered*, That a credit balance shall be deemed to be created, if it still exists, at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a customer's activity on the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered*, That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by parties other than respondent or to transactions arising out of installment sales contracts.

F. *It is further ordered*, That respondent shall, within sixty (60) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

G. *It is further ordered*, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

H. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its retail operating divisions.

IN THE MATTER OF

McCRORY CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2676. Complaint, June 18, 1975–Decision, June 18, 1975

Consent order requiring a New York City parent and its department store operation, Lerner Stores Corporation, among other things to provide charge customers having credit balances with periodic statements setting forth credit balances, no less than three times in a six-month period following creation of the balance; to notify charge account customers with credit balances of their right to a cash refund of the balance; to stop deleting credit balances of $1.00 or more from a customer's account before making a cash refund or an offsetting purchase has been made; to automatically refund amounts of unclaimed credit balances after a period of account inactivity; and to refund all unclaimed credit balances more than $1.00 created since June 30, 1972.

Appearances

For the Commission: *Alan D. Reffkin, Justin Dingfelder,* and *Howard F. Daniel.*

For the respondents: *Max Wild, Rubin, Wachtel, Baum & Levin,* New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that McCrory Corporation, a corporation, and its wholly-owned subsidiary, Lerner Stores Corporation, a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent McCrory Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. Its principal office and place of business is located at 360 Park Ave., New York, N.Y. Respondent McCrory Corporation has the power to elect the Board of Directors of Lerner Stores Corporation.

Respondent Lerner Stores Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland. Its principal office and place of business is located at 460 W. 33rd St., New York, N.Y.

PAR. 2. Respondent Lerner Stores Corporation operates and controls a number of retail clothing stores in 39 States, Puerto Rico and the Virgin Islands.

PAR. 3. Respondents sell and distribute merchandise in commerce by operating and controlling retail clothing stores in a number of States and by causing merchandise to be shipped from their warehouses and from the places of business of their various suppliers to their warehouses and retail clothing stores for distribution to and purchase by the general public located in States other than those from which such shipments originate. By these and other acts and practices, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in merchandise and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of their aforesaid business, respondents permit customers of Lerner Stores Corporation who qualify for credit to charge purchases in accordance with the terms of charge account agreements executed between said customers and respondents. On occasion a customer's charge account balance represents an amount of money owed to the customer by respondents, rather than an amount of money owed to respondents by the customer. This credit balance is the result of, among other things, overpayments by the customer or credits for returned merchandise.

PAR. 5. Respondent Lerner Stores Corporation customarily provides each customer having a charge account credit balance a monthly statement setting forth the amount of the credit balance, at the end of the billing cycle during which the credit balance is created and at the end of each subsequent billing cycle during which the credit balance has not been cleared from the customer's account and a transaction on the customer's account occurs. Respondent Lerner Stores Corporation furnishes a charge account customer with one additional monthly statement setting forth his credit balance at the end of the first billing cycle during which the customer transacts no business on his charge account after creation of his credit balance.

If a customer with a credit balance on his charge account does not specifically request that respondent Lerner Stores Corporation pay him the amount of his credit balance but purchases merchandise or services on his charge account, before respondent Lerner Stores Corporation refunds the amount of his credit balance, the amount of the credit balance is applied to reduce or eliminate the customer's obligation created by the purchase of merchandise or services.

For a substantial period of time, if the customer did not request a refund in cash of the amount of the credit balance or make a purchase within a period of time allowed by Lerner Stores Corporation for activity to occur on the customer's account, Lerner Stores Corporation, through bookkeeping entries, cleared the amount of the credit balance from the customer's charge account. No cash payment to the customer was made at the time of the clearing of his credit balance from his charge account. Subsequent periodic statements were not mailed until a later purchase was made. The outstanding credit balance that was previously reflected on a periodic billing statement was not applied to any purchase occurring after the credit balance had been cleared from the customer's account.

At no time was the customer informed of his right to receive a cash refund nor did Lerner Stores Corporation voluntarily refund cash representing outstanding credit balances without a specific customer request. Respondent Lerner Stores Corporation, through such acts and practices eliminated substantial dollar amounts of credit balances as aforesaid from customer accounts in a substantial number of instances.

PAR. 6. By failing to notify customers with charge account credit balances that they had the right to request and receive cash payment of the amounts of their credit balances; by failing to furnish customers, at the end of each and every billing cycle during which credit balances remained outstanding, monthly statements reflecting the amount of their credit balances; by deleting outstanding credit balances from accounts without refunding such amounts and by providing billing statements for subsequent purchases which did not reflect such outstanding credit balances, Lerner Stores Corporation caused a substantial number of their customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of Lerner Stores Corporation set forth in Paragraphs Five and Six above were to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedures prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent McCrory Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 360 South Park Ave., New York, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent McCrory Corporation, a corporation, and its wholly-owned subsidiary, Lerner Stores Corporation, a corporation, (hereinafter collectively referred to as respondent), their successors and assigns and their representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer open end credit accounts or other retail consumer charge accounts (including, but not necessarily limited to thirty (30) day charge accounts) created incident to the business of selling consumer merchandise and services at retail in the United States or any of its territories or possessions, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to provide each charge account customer having a credit balance created after the date of entry of this order with a periodic statement setting forth such credit balance, no fewer than three times during the six month period following the creation of the credit balance.

2. Failing to notify each charge account customer having a credit balance created after the date of entry of this order of the right to request and receive a refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement to be accompanied by a return envelope; such disclosure shall be consistent with, but need not be the same as, the following:

The Credit Balance shown on [this] [the enclosed] statement represents money we owe you. Therefore:

NO PAYMENT IS REQUIRED

You may apply this balance to future purchases, or you may obtain a refund by mail by presenting your statement at our store or by returning [the top half of] your statement in the enclosed envelope.

If you do not charge against this credit or request a refund, a check will be mailed to you automatically after six months, except a credit balance of one dollar ($1.00) or less will not be refunded unless specifically requested, and it will not be credited against future purchases after this period.

Such disclosures need not be made by any store in the event it is that store's policy to refund automatically and without request all credit balances regardless of amount. In such cases the following disclosures must be made:

For refund contact [our] [any] store or we will send check in 6 [or smaller number] months.

3. Writing off or deleting any credit balance of more than one dollar ($1.00) created after the date of entry of this order from a customer's account before respondent has made a refund or the customer has made a fully offsetting purchase, unless such credit balance is not in fact owed to the customer, or unless respondent has complied with the requirements of Paragraph B below.

4. Failing to refund to each charge account customer with a credit balance of more than one dollar ($1.00) created after the date of entry of this order the full amount of said credit balance no later than thirty-

one (31) days from the end of the sixth consecutive billing cycle during which the credit balance exists and the customer neither transacts any business on his account nor requests a refund, unless such credit balance is not in fact owed to the customer.

A. *It is further ordered*, That with respect to each credit balance owed a customer in the amount of more than one dollar ($1.00) which was created at any time since June 30, 1972, and which has not been refunded to the customer as of the date of entry of the order respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for compliance herewith; *Provided, however*, That nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s) in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s), or an accompanying notice attached to the certificate, shall clearly and conspicuously disclose that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent shall comply with the provisions of this paragraph no later than three (3) months after the date of entry of this order, and the report required by Paragraph F of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered*, That each refund shall be given to the customer by mailing a check (or a credit certificate(s) in the case of credit balances existing prior to the date of entry of this order) payable to the order of the customer at the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address in respondent's records. In the event that any such statement or check (or credit certificate) is returned to respondent with a notification to the effect that the addressee is not located at the address to which it was sent, respondent shall make one remailing of the check (or credit certificate) or statement with an address correction request to the Post Office. If the check (or certificate) or statement which has been remailed is returned to respondent and represents an amount of twenty-five dollars ($25.00) or more, the respondent shall employ one of the following procedures: contacting a credit bureau; employment of an independent contractor engaged in the business of skip-locating; contacting the customer's last known employer as shown in respondent's records; or reinstating the full amount of the credit balance on the customer's account to be retained for one year from the date on which the remailed check or statement was returned so that offsetting purchases can be made. If a remailed check (or credit certificate) or statement reflecting a credit balance of less than twenty-five dollars ($25.00) is returned, respondent shall not be required to take any of the additional actions set forth in the preceding sentence. Thereafter respondent shall be relieved of any further obligation to send any additional notice and/or any refund with respect to the credit balance in question; *Provided, however*, That in the event said customer should subsequently request a refund of any such credit balance owed the customer, respondent shall promptly make such refund.

C. *It is further ordered*, That if a customer requests, in person or by mail, a refund of a credit balance in any amount which had been reflected at any time on such customer's account, respondent shall, within thirty (30) days of receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with a written explanation, with supporting documentation when available, of the reason(s) for refusing to refund the amount requested.

D. *It is further ordered*, That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered*, That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by parties other than respondent or to transactions arising out of layaway plans or installment sales contracts.

F. *It is further ordered*, That respondent shall, within sixty (60) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

G. *It is further ordered*, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of the order such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation.

H. *It is further ordered*, That respondent shall forthwith distribute a copy of this order to each of its retail operating divisions.

IN THE MATTER OF

CARTER HAWLEY HALE STORES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2677. Complaint June 18, 1975- Decision June 18, 1975

Consent order requiring a Los Angeles, Calif., parent and five of its department store operations located in California, Texas and New York, among other things to provide charge customers having credit balances with periodic statements setting forth credit balances, no less than three times in a six-month period following creation of the balance; to notify charge account customers with credit balances of their right to a cash refund of the balance; to stop deleting credit balances of $1.00 or more from a customer's account before making a cash refund or an offsetting purchase has been made; to automatically refund amounts of unclaimed credit balances after a period of account inactivity; and to refund all unclaimed credit balances more than $1.00 created since June 30, 1972.

Appearances

For the Commission: *Alan D. Reffkin, Justin Dingfelder,* and *Howard F. Daniels.*

For the respondents: *Bingham B. Leverich, Covington & Burling,* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Carter Hawley Hale Stores, Inc., formerly Broadway-Hale Stores, Inc., a corporation, its divisions, Broadway Department Stores, Emporium Capwell, Weinstock's, Neiman-Marcus, and its wholly-owned subsidiary, Bergdorf Goodman Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Carter Hawley Hale Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 600 S. Spring St., Los Angeles, Calif. Respondent Carter Hawley Hale Stores, Inc. has the legal authority to formulate, control and direct the policies, acts and practices, including those hereinafter set forth, of its divisions, Broadway Department Stores, Emporium Capwell, Weinstock's and Neiman-Marcus, and has the power to elect the board of directors of its wholly-owned subsidiary Bergdorf Goodman Inc.

Respondent Broadway Department Stores is a division of Carter Hawley Hale Stores, Inc. Its principal office and place of business is located at 3880 N. Mission Rd., Los Angeles, Calif.

Respondent Emporium Capwell is a division of Carter Hawley Hale Stores, Inc. Its principal office and place of business is located at 835 Market St., San Francisco, Calif.

Respondent Weinstock's is a division of Carter Hawley Hale Stores, Inc. Its principal office and place of business is located at K St. at Twelfth, Sacramento, Calif.

Respondent Neiman-Marcus is a division of Carter Hawley Hale Stores, Inc. Its principal office and place of business is located at Main and Ervay St., Dallas, Tex.

Respondent Bergdorf Goodman Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 754 Fifth Ave., New York, N.Y.

PAR. 2. Respondent Carter Hawley Hale Stores, Inc., through operating divisions, operates and controls a number of retail department stores in California, Arizona, Nevada, and Utah. These department stores are operated under the trade names the Broadway, the Emporium Capwell's, and Weinstock's. Respondent Carter Hawley Hale Stores, Inc., also operates and controls retail specialty stores through its division Neiman-Marcus and its wholly-owned subsidiary Bergdorf Goodman Inc.

Respondent Bergdorf Goodman Inc. operates a retail specialty store in New York.

PAR. 3. Respondents sell and distribute merchandise in commerce by operating and controlling retail department and specialty stores in a number of States and by causing merchandise to be shipped from their warehouses and from the places of business of their various suppliers to their warehouses and retail department and specialty stores for distribution to and purchase by the general public located in States other than those from which such shipments originate. By these and other acts and practices, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in merchandise and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of their aforesaid business, respondents permit customers who qualify for credit to charge purchases in accordance with the terms of charge account agreements executed between said customers and respondents. On occasion a customer's charge account balance represents an amount of money owed to the customer by a respondent, rather than an amount of money owed to a respondent by the customer. This credit balance is the result of, among other things, overpayments by the customer or credits for returned merchandise.

PAR. 5. Respondents customarily provide each customer having a charge account credit balance a monthly statement setting forth the amount of the credit balance, at the end of the billing cycle during which the credit balance is created and at the end of each subsequent billing cycle during which the credit balance has not been cleared from the customer's account and a transaction on the customer's account occurs. Of all respondents, only Emporium Capwell and Neiman-Marcus furnish charge account customers with additional monthly statements setting forth their credit balances, at the end of a number of billing cycles during which the customers transact no business on their charge accounts. A customer of Emporium Capwell is furnished such a monthly statement at the end of each of five consecutive billing cycles following the billing cycle of the customer's last transaction. A customer of Neiman-Marcus is furnished such a monthly statement at the end of each of eleven consecutive billing cycles following the billing cycle of the customer's last transaction.

If a customer with a credit balance on his charge account does not specifically request that the respondent concerned pay him the amount of his credit balance but purchases merchandise or services on his charge account, the respondent for a limited time applies the amount of the credit balance to reduce or eliminate the customer's obligation created by the purchase of merchandise or service.

If the customer does not request a refund in cash of the amount of the credit balance or make a purchase within a period of time allowed by respondents for activity to occur on the customer's account, the respondents, with the exception of the Broadway Department Stores Division, through bookkeeping entries, clear the amount of the credit balance from the customer's charge account. The Broadway Department Stores Division engaged in this practice through 1971. No cash payment to the customer is made at the time of the clearing of his credit balance from his charge account. Subsequent periodic statements are not mailed until a later purchase is made. The outstanding credit balance that was previously reflected on a periodic billing statement is not applied to any purchase occurring after the credit balance has been cleared from the customer's account.

At no time is the customer informed of his right to receive a cash refund nor do respondents voluntarily refund cash representing outstanding credit balances without a specific customer request. Respondents have through such acts and practices eliminated substantial dollar amounts of credit balances as aforesaid from customer accounts in a substantial number of instances.

PAR. 6. By failing to notify customers with charge account credit balances that they have the right to request and receive cash payment of the amounts of their credit balances; by failing to furnish customers, at the end of each and every billing cycle during which credit balances remain outstanding, monthly statements reflecting the amount of their credit balances; by deleting outstanding credit balances from accounts without refunding such amounts and by providing billing statements for subsequent purchases which do not reflect such outstanding credit balances, respondents have caused a substantial number of their customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondents set forth in Paragraphs Five and Six above were and are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedures prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Carter Hawley Hale Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 600 S. Spring St., Los Angeles, Calif.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Carter Hawley Hale Stores, Incorporated, its divisions Broadway Department Stores, Emporium Capwell, Weinstock's and Neiman-Marcus, and its wholly-owned subsidiary Bergdorf Goodman Inc., a corporation (hereinafter collectively referred to as respondent), their successors and assigns and their representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer open end credit accounts or other retail consumer charge accounts (including, but not necessarily limited to thirty (30) day charge accounts) created incident to the business of selling consumer merchandise and services at retail, in the United States or any of its territories, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to provide each charge account customer having a credit balance created after the date of entry of this order with a periodic statement setting forth such credit balance, no fewer than three times during the six month period following the creation of the credit balance.

2. Failing to notify each charge account customer having a credit balance created after the date of entry of this order of the right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement and accompanied by a self-addressed return envelope. Such disclosure may be in the following terms: "We owe you . Your balance will be refunded on request. After 6 months it will be refunded automatically, except if $1.00 or less, it will not be applied to purchases or refunded unless requested." If such form of disclosure is not used, respondent shall make a disclosure which shall be consistent with but need not be the same as the following:

NO PAYMENT REQUIRED

The Credit Balance shown on [this] [the enclosed] statement represents money we owe you. You may obtain a refund by mail by presenting your statement at our store or by returning the top half of your statement in the enclosed envelope. If you do not charge against this credit or request a refund, a check will be mailed to you automatically after six months, except a credit balance of one dollar ($1.00) or less will not be refunded unless specifically requested, and it will not be credited against future purchases after this period.

Such disclosure need not be made by any store in the event it is that store's policy to refund automatically and without request all credit balances regardless of amount. In such case the following disclosure or a disclosure which provides at least the following information must be made in a clear and conspicuous manner:

For refund send back top half of statement or we will send check in 6 months.

3. Writing off or deleting any credit balance of more than one dollar ($1.00) created after the date of entry of this order from a customer's account before the respondent has made a cash refund or the customer has made a fully offsetting purchase, unless such credit balance is not in fact owed to the customer, or unless respondent has complied with the requirements of Paragraph B below.

4. Failing to refund to each charge account customer with a credit balance of more than one dollar ($1.00) created after the date of entry of this order the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive billing cycle during which the credit balance exists and the customer neither transacts any business on his account nor requests a refund, unless such credit balance is not in fact owed to the customer.

A. *It is further ordered*, That with respect to each credit balance owed a customer in the amount of more than one dollar ($1.00) which was created at any time since June 30, 1972, and which has not been refunded to the customer as of the date of entry of the order respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for compliance herewith; *Provided, however*, That nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s) in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s), or an accompanying notice attached to the certificate, shall clearly and conspicuously disclose that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent shall comply with the provisions of this paragraph no later than three (3) months after the date of entry of this order, and the report required by Paragraph F of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered*, That each refund shall be given to the customer either in person or by mailing a check (or a credit certificate(s) in the case of credit balances existing prior to the date of entry of this order) payable to the order of the customer at the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address shown in respondent's records. In the event that any such statement or check (or credit certificate) is returned to respondent with a notification to the effect that the addressee is not located at the address to which it was sent, respondent then shall make one remailing of the check (or credit certificate) or statement with an address correction request. If a remailed check (or credit certificate) or statement reflecting a credit balance in excess of twenty-five dollars ($25.00) is returned, respondent shall reinstate the full amount of the credit balance on the customer's account to be retained for one year from the date on which the remailed check (or credit certificate) or statement was returned, so that offsetting purchases can be made; *Provided, however*, That in lieu of the preceding, respondent may seek to obtain a current mailing address by either contacting a local credit bureau or employing an independent contractor regularly engaged in the business of skip-locating. If a remailed check (or credit certificate) or statement reflecting a credit balance of twenty-five (25) dollars or less is returned, respondent shall not be required to take any of the additional actions set forth in the preceding sentence. Thereafter, respondent shall be relieved of any further obligation to send any additional statement and/or any refund with respect to the credit balance in question; *Provided, however*, That in the event said customer should subsequently request a refund of any such credit balance owed the customer, respondent shall make such refund or provide a written explanation pursuant to the terms of Paragraph C.

C. *It is further ordered*, That if a customer requests, in person or by mail, a refund of a credit balance in any amount which has been reflected at any time on such customer's account, respondents shall, within thirty (30) days of receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with a written explanation, with supporting documentation when available, of the reason(s) for refusing to refund the amount requested.

D. *It is further ordered*, That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered*, That notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by third parties.

F. *It is further ordered*, That respondent shall, within sixty (60) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

G. *It is further ordered*, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

H. *It is further ordered*, That respondent shall forthwith distribute a copy of this order to each of its retail operating divisions and subsidiaries.

IN THE MATTER OF

ASH GROVE CEMENT CO.*

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 8785. Complaint, July 8, 1969–Decision, June 24, 1975

Order requiring a Kansas City, Mo., manufacturer and seller of lime and portland cement, among other things, to divest itself of two producers of ready mixed concrete in the Kansas City marketing area, and for a ten-year period, not to acquire, without prior Commission approval, ready mixed concrete companies whose purchases of portland cement exceed designated amounts. The Commission also decided that a third acquisition of a quarrying business was not anticompetitive.

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* For appearances, see p. 969, herein.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the provisions of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§18 and 45, and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

I. DEFINITIONS

1. For the purpose of this complaint the following definitions shall apply:

a. "Portland cement" includes Types I through V of portland cement as specified by the American Society for Testing Materials. Neither masonry nor white cement is included.

b. "Ready mixed concrete" includes all portland cement concrete which is manufactured and delivered to a purchaser in a plastic and unhardened state. Ready mixed concrete includes central-mixed concrete, shrink-mixed concrete and transit-mixed concrete.

c. "Kansas City area" consists of the counties of Cass, Clay, Jackson and Platte, Mo., and the counties of Johnson and Wyandotte, Kans.

II. ASH GROVE CEMENT CO.

2. Ash Grove Cement Co. (hereinafter "Ash Grove") is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 10 Main Center, Kansas City, Mo.

3. Ash Grove is principally engaged in the manufacture and sale of lime from plants in Portland, Ore., and Springfield, Mo. and the manufacture and sale of portland cement from plants in Louisville, Neb. and Chanute, Kans. In 1966, Ash Grove had net sales of $24,514,383, net earnings of $4,445,389, and as of Dec. 31, 1966, assets of $51,260,681.

4. The Kansas City area is one of the principal markets for portland cement manufactured at Ash Grove's Chanute, Kans. plant. Ash Grove has sold portland cement in the Kansas City area since approximately 1908 and, since 1962, has operated a portland cement transfer station in Kansas City, Kans. to better serve its customers by truck in and around the Kansas City area. In 1966, Ash Grove's Chanute, Kans. plant shipped almost 2.1 million barrels of portland cement of which almost .9 million barrels were shipped to customers in the Kansas City area. Ash Grove has been one of the three leading portland cement suppliers to the Kansas City area since at least 1961.

5. At all times relevant herein, Ash Grove was engaged in selling

and shipping portland cement in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act and Federal Trade Commission Act.

III. FORDYCE CONCRETE, INC.

6. Fordyce Concrete, Inc. (hereinafter "Fordyce") was, prior to Nov. 8, 1966, a corporation organized and existing under the laws of the State of Kansas with its principal office located in Kansas City, Kans.

7. Since 1961, Fordyce had been engaged in the production and sale of ready mixed concrete in the Kansas City area and on Nov. 8, 1966 was operating two ready mixed concrete plants in the Kansas City area. For the fiscal year ended Jan. 31, 1966, Fordyce had sales of $2,804,068, net profit of $34,910, and as of Jan. 31, 1966, total assets of $1,259,003.

8. Fordyce has been one of the leading producers of ready mixed concrete and consumers of portland cement in the Kansas City area since its organization in 1961 and, in 1966, sold over 216,000 cubic yards of ready mixed concrete and consumed over 299,000 barrels of portland cement.

9. At all times relevant herein, Fordyce was engaged in selling and shipping ready mixed concrete and purchasing portland cement in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

IV. ACQUISITION

10. On June 1, 1964, Ash Grove purchased 5,225 shares of authorized but previously unissued share of Fordyce for $100,000 which resulted in its ownership of 50 percent of the outstanding stock of Fordyce. On Nov. 8, 1966, Ash Grove purchased the other 5,225 outstanding shares of Fordyce for $300,000, giving Ash Grove 100 percent ownership of Fordyce.

V. LEE'S SUMMIT READY-MIXED CONCRETE & MATERIALS COMPANY

11. Lee's Summit Ready-Mixed Concrete & Materials Company (hereinafter Lee's Summit) was, prior to Jan. 4, 1966, a corporation organized and existing under the laws of the State of Missouri, with its principal office located in Kansas City, Mo.

12. Since 1955, Lee's Summit had been engaged in the production and sale of ready mixed concrete in the Kansas City area and, on Jan. 4, 1966, was operating two ready mixed concrete plants in the Kansas City area. Lee's Summit was also engaged in the production and sale of

ready mixed concrete in Springfield, Mo. from about September 1963 through about May 1966. For the fiscal year ended Feb. 28, 1966, Lee's Summit had sales of $1,603,751, net profit of $21,593, and as of Feb. 28, 1966, total assets of $459,750.

13. Lee's Summit has been one of the leading producers of ready mixed concrete and consumers of portland cement in the Kansas City area since 1961 and in 1966 sold over 66,000 cubic yards of ready mixed concrete and consumed over 91,000 barrels of portland cement.

14. At all times relevant herein, Lee's Summit was engaged in selling and shipping ready mixed concrete and purchasing portland cement in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

VI. UNION QUARRIES

15. Prior to Jan. 4, 1966, Union Quarries was a division of Union Construction Company, Kansas City, Mo. The owners of Union Construction Company also owned two-thirds of the outstanding stock of Lee's Summit. Union Quarries operated rock quarrying and crushing operations at the two Kansas City area locations on which Lee's Summit also operated ready mixed concrete plants. Union Quarries also had a third Kansas City area location in Lenexa, Kans. It sold crushed stone and portland cement treated base rock in the Kansas City area from all three locations. In 1965, it consumed over 26,000 barrels of portland cement.

16. At all times relevant herein, Union Quarries was engaged in selling and shipping crushed stone and portland cement treated base rock and purchasing portland cement in interstate commerce and was engaged in commerce, as "commerce" is defined in the Clayton Act and Federal Trade Commission Act.

VII. ACQUISITION

17. On Aug. 31, 1962, Ash Grove purchased one-third of the outstanding common and preferred stock of Lee's Summit for $47,500. On Jan. 4, 1966, Ash Grove purchased the other two-thirds of the outstanding common and preferred stock of Lee's Summit for $200,000. Also, on Jan. 4, 1966, as part of the same transaction and agreement by which the Lee's Summit stock was acquired, Ash Grove purchased from six individuals, real estate, machinery, equipment and other property used in the Union Quarries quarrying business for $1,050,000. On Jan. 13, 1966, Ash Grove assigned all of the rights and obligations with regard to the assets used in the operation of Union Quarries to its

newly organized wholly-owned subsidiary, Union Quarries, Inc. a Missouri corporation, which now owns the assets.

VIII. MERGER

18. On Apr. 25, 1966, the name of Lee's Summit was changed to Summit Ready Mix Co. (hereinafter "Summit"). Ash Grove transferred the assets of Summit to Fordyce, its wholly-owned subsidiary on Dec. 20, 1966 and liquidated Summit as of Dec. 31, 1966. As of Dec. 31, 1966, Fordyce had assets of over $1,700,000 and operated four ready mixed concrete plants in the Kansas City area (two former Lee's Summit plants and two former Fordyce plants) under the trade name Fordyce-Summit.

IX. NATURE OF TRADE AND COMMERCE

19. Portland cement is a material which in the presence of water binds aggregates, such as sand and gravel, into concrete. Portland cement is an essential ingredient in the manufacture of concrete and it represents about 60 percent of the material cost and over one-third of the total cost of manufacturing, distributing and selling ready mixed concrete, the only form in which concrete is sold as a commodity.

20. The portland cement industry in the United States is substantial. In 1966, there were about 50 portland cement companies in the United States operating approximately 184 plants. Total shipments of portland cement in that year amounted to approximately 390 million barrels, valued at about $1.2 billion.

21. Portland cement manufacturers sell their portland cement to consumers such as ready mixed concrete companies, concrete product manufacturers, contractors and building material dealers. On a national basis, approximately 60 percent of all portland cement is shipped to firms engaged in the production and sale of ready mixed concrete. However, in heavily populated metropolitan areas, the percentage of portland cement consumed by ready mixed concrete companies is generally higher. In general, portland cement consumers have not been integrated or affiliated with portland cement manufacturers. Each has operated independently on a vendor-vendee basis.

22. In recent years, there has been a significant trend of mergers and acquisitions by which ready mixed concrete companies in major metropolitan markets in various portions of the United States have become integrated with portland cement companies. Since 1959, there have been at least 40 such acquisitions.

23. Each vertical merger or acquisition which occurs in the portland cement industry potentially forecloses competing portland cement

manufacturers from a segment of the market otherwise open to them and places great pressure on competing manufacturers likewise to acquire portland cement consumers in order to protect their markets. Thus, each such vertical acquisition may form an integral part of a chain reaction of such acquisitions-contributing both to the share of the market already foreclosed, and to the impetus for further such acquisitions.

24. In the Kansas City area the trend toward vertical integration is well advanced. Four of the leading ready mixed concrete sellers and portland cement consumers in this area have become integrated with portland cement companies since 1963 through acquisition. More than 40 percent of the market for portland cement in the Kansas City area has been potentially foreclosed by vertical integration.

X. EFFECTS OF THE ACQUISITIONS

25. The effect of the acquisitions of Fordyce and Lee's Summit and their merger into one operation and the acquisition of the assets used in the operation of Union Quarries, both in themselves and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of (1) portland cement and (2) ready mixed concrete in the United States as a whole and various parts thereof, including the Kansas City area, in the following ways, among others:

a. Ash Grove's competitors have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. The ability of Ash Grove's non-integrated competitors effectively to compete in the sale of portland cement and ready mixed concrete has been and/or may be substantially impaired.

c. The entry of new portland cement and ready mixed concrete competitors may have been and/or may be inhibited or prevented.

d. The production and sale of ready mixed concrete, usually a decentralized, locally controlled, small business industry, has become concentrated in the hands of a relatively few manufacturers of portland cement.

XI. VIOLATIONS CHARGED

26. The acquisitions by Ash Grove of Fordyce and Lee's Summit and their merger into one operation constitute separately and collectively violations of Section 7 of the Clayton Act, as amended, and the acquisition of the assets used in the operation of Union Quarries constitutes a violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY ADMINISTRATIVE LAW JUDGE ANDREW C. GOODHOPE

SEPTEMBER 23, 1974

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on July 8, 1969, issued its complaint in this proceeding charging Ash Grove Cement Company ("Ash Grove"), a corporation, with having violated Section 7 of the Clayton Act, as amended (15 U.S.C. §18), by its acquisition of Lee's Summit Ready-Mixed Concrete & Materials Company ("Lee's Summit"), and Fordyce Concrete, Inc. ("Fordyce"). The complaint further charged Ash Grove with violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. §45), by its acquisition of certain assets from individuals, which assets were formerly a division of Union Construction Company of Kansas City, Mo. The complaint was duly served on respondent Ash Grove and respondent appeared by its counsel and filed an answer admitting certain of the allegations of the complaint by denying that it had violated Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

Extensive hearings were thereafter held, at which time testimony and documentary evidence were offered in support of and in opposition to the allegations of the complaint. At the close of all the evidence and pursuant to leave granted by the administrative law judge, proposed findings of fact, conclusions of law, briefs and proposed orders were filed by counsel supporting the complaint and counsel for the respondent.

Proposed findings not herein adopted either in the form or substance proposed are rejected as not supported by the evidence or as involving immaterial matters. Having reviewed the entire record in this proceeding, including the proposed findings and briefs, the administrative law judge, based upon the entire record, makes the following:

FINDINGS OF FACT[1]

THE RESPONDENT

1. Ash Grove Cement Company is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 10 Main Center, Kansas City, Mo.

2. Ash Grove is principally engaged in the manufacture and sale of lime from plants in Portland, Ore., and Springfield, Mo., and the manufacture and sale of portland cement from plants in Louisville,

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[1] The essential jurisdictional facts and facts concerning the various acquisitions were alleged in the complaint and admitted in respondent's answer.

Nebr., and Chanute, Kans. In 1966, Ash Grove had net sales of $24,514,383, net earnings of $4,445,389 and as of Dec. 31, 1966, assets of $51,260,681.

3. At all times relevant herein, Ash Grove was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

Fordyce Concrete, Inc.

4. On June 1, 1964, Ash Grove purchased 5,225 shares of authorized but previously unissued shares of Fordyce for $100,000 which resulted in its ownership of 50 percent of the outstanding stock of Fordyce. On Nov. 8, 1966, Ash Grove purchased the other 5,225 outstanding shares of Fordyce for $300,000 giving Ash Grove 100 percent ownership of Fordyce.

5. Prior to Nov. 8, 1966, Fordyce was a corporation organized and existing under the laws of the State of Kansas, with its principal office located in Kansas City, Kans.

6. Since 1961, Fordyce had been engaged in the production and sale of ready mixed concrete in the Kansas City metropolitan area ("KCMA") and on Nov. 8, 1966 was operating two ready mixed concrete plants there. For the fiscal year ended Jan. 31, 1966, Fordyce had sales of $2,804,068, net profit of $34,910 and as of Jan. 31, 1966, total assets of $1,259,003.

7. At all times relevant herein, Fordyce was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

Lee's Summit Ready-Mixed Concrete & Materials Company

8. On Aug. 31, 1962, Ash Grove purchased one-third of the outstanding common and preferred stock of Lee's Summit for $447,500. On Jan. 4, 1966, Ash Grove purchased the other two-thirds of the outstanding common and preferred stock of Lee's Summit for $200,000.

9. Lee's Summit was, prior to Jan. 4, 1966, a corporation organized and existing under the laws of the State of Missouri, with its principal office located in Kansas City, Mo.

10. Since 1955, Lee's Summit had been engaged in the production and sale of ready mixed concrete in the KCMA and on Jan. 4, 1966, was operating two ready mixed concrete plants there. Lee's Summit was also engaged in the production and sale of ready mixed concrete in Springfield, Mo., from about September 1963 through about May 1966. For the fiscal year ended Feb. 28, 1966, Lee's Summit had sales of $1,603,751, net profit of $21,593 and total assets of $459,750.

11. At all times relevant herein, Lee's Summit was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

12. On Apr. 25, 1966, the name of Lee's Summit was changed to Summit Ready Mix Co. (hereafter "Summit"). Ash Grove transferred

the assets of Summit to Fordyce, its wholly-owned subsidiary, on Dec. 20, 1966, and liquidated Summit as of Dec. 31, 1966. As of Dec. 31, 1966, Fordyce had assets of over $1,700,000 and operated four ready mixed concrete plants in the KCMA (two former Lee's Summit plants and two former Fordyce plants) under the trade name Fordyce-Summit.

Union Quarries

13. On Jan. 4, 1966, as part of the same transaction and agreement by which the Lee's Summit stock was acquired, Ash Grove purchased from six individuals, real estate, machinery, equipment and other property used in the Union Quarries quarrying business for $1,050,000. On Jan. 13, 1966, Ash Grove assigned all of the rights and obligations with regard to the assets used in the operation of Union Quarries to its newly organized wholly-owned subsidiary, Union Quarries, Inc., a Missouri corporation, which now owns the assets.

14. Prior to Jan. 4, 1966, Union Quarries was a division of Union Construction Company, Kansas City, Mo. The owners of Union Construction Company also owned two-thirds of the outstanding stock of Lee's Summit.

15. Union Quarries operated rock quarrying and crushing operations at the two Kansas City locations on which Lee's Summit operated ready mixed concrete plants. Union Quarries also had a third Kansas City area location in Lenexa, Kans. It sold crushed stone and portland cement treated base rock in the Kansas City area from all three locations. In 1965, it consumed over 26,000 barrels of portland cement.

16. At all times relevant herein, Union Quarries was engaged in commerce as "commerce" is defined in the Clayton Act and Federal Trade Commission Act.

Lines of Commerce

17. The complaint alleges that the effect of the acquisitions of Fordyce and Lee's Summit and the acquisition of the assets of Union Quarries may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale in two lines of commerce: (1) portland cement and (2) ready mixed concrete. The respondent denies this allegation.

18. Portland cement is a material which in the presence of water binds aggregates, such as sand and gravel, into concrete. Portland cement is an essential ingredient in the manufacture of concrete and is the most predominant cement manufactured in the United States (Admitted, Ans. Para. 19; CX 98).

19. The portland cement industry in the United States is substantial. In 1966, there were about 50 portland cement companies in this country operating approximately 184 plants. Total shipments of portland cement in that year amounted to approximately 390 million

barrels, valued at about $1.2 billion (CX 46, 47, 49, 50, 51, 52, 53, 54, 55 and 68).

20. Portland cement manufacturers sell their product to consumers such as ready mixed concrete companies, concrete product manufacturers, contractors, and building material dealers (Admitted, Ans. Para. 21).

21. On a national basis, approximately 60 percent of all portland cement is shipped to firms engaged in the production and sale of ready mixed concrete. However, in heavily populated metropolitan areas, the percentage of portland cement consumed by ready mixed concrete companies is generally higher (CX 49, Table 16; 50, Table 17; 51 and 52, Table 15; 53 and 55, Table 14, and 94).

22. In general, portland cement consumers have not been integrated or affiliated with portland cement manufacturers. Each has operated independently on a vendor-vendee basis (CX 99; Tr. 1640-43, 2549).

23. During the late 1950's and into the 1960's, there has been a significant trend of mergers and acquisitions by which ready mixed concrete companies in various markets throughout the United States have become integrated with portland cement companies. Since 1959, there have been at least 40 such acquisitions (CX 74).

24. Portland cement is a homogenous product manufactured to standard specifications of the American Society for Testing Materials (ASTM). Generally, the product of one manufacturer is physically substitutable for the product of another (Tr. 2103, 2112, 2208, 2308-09, 2365, 2472, 2627; CX 39C, CX 54, p. 3). There are five basic types of portland cement included in the ASTM specifications. While these five types are used by concrete manufacturers, Types I and II are the most predominantly produced and used, accounting for more than 90 percent of the sales of portland cement (Table 4 of CX 49 and 50; Table 3 of CX 51, 52, 53 and 55; Tr. 2105-06, 2203-04). The same manufacturing process and raw materials are used in producing Types I through V of portland cement. Differences in types occur in the composition of the raw materials, burning temperature, and the fineness of grinding (CX 54, p. 3; 41Q; Tr. 2105-07, 2181, 2203-05, 2270, 2308, 2365).

25. During the 1960's, portland cement was sold in units of sacks representing 94 pounds and barrels representing four sacks or 376 pounds. The majority of portland cement was shipped in bulk (CX 41 0, 54, pp. 4 and 13; Tr. 2119-20, 2205, 2458).

26. Portland cement is a hydraulic cement which means it will harden under water. However, it is distinguishable in its characteristics and uses from other hydraulic cements such as masonry and natural cements. Masonry cement has a portland cement base but it is not a

portland cement. Masonry cement is used to lay bricks or block. Masonry cement is usually shipped in sacks rather than bulk and a barrel of it weighs 280 pounds compared to a barrel of portland cement which weighs 376 pounds. Masonry cement has different customers and prices than portland cement (CX 54, p. 4; Tr. 2107-08, 2205).

27. Portland cement is manufactured from raw materials such as limestone, clay, shale and alumina, which are combined, burned and ground with gypsum to an extreme fineness (CX 54, p. 3; CX 41E; Tr. 2103-04, 2202).

28. The portland cement industry is a highly capital intensive industry (Tr. 2627, 2112-13). In addition to requiring large amounts of raw materials, a portland cement plant needs large blending tanks, loading and conveying facilities, primary and secondary crushers, kilns, finished grinding equipment and various shipping devices. Only portland cement and subtypes have been made with this specialized equipment (CX 41; Tr. 2112-13, 2209). Due to the high fixed costs experienced by the industry, a plant must be operated at high levels of capacity in order to reduce unit costs sufficiently to break even or make a profit (Tr. 2143, 2240-41, 2315, 2627). During the period 1961-68, if a plant was only selling at 50 percent of its capacity, it would not be running profitably (Tr. 2173, 2240-41, 2263, 2419). A plant would have had to be producing at 85-90 percent of its capacity to make a profit at that time (Tr. 2144). In addition to the large investment in equipment, a new plant faces preoperating costs. There is an initial startup period during which costs are high and profits are not expected. It was not unusual in the portland cement industry for a new plant to experience a startup period of 2 or 3 years before achieving profitability (Tr. 2311-12, 2360).

29. Ready mixed concrete producers have been the most important purchasers in terms of regularity and quantity of purchases (CX 18I, 39D; Tr. 2113, 2115-16, 2209-10, 2312-13, 2365-67). Although heavy contractors are large purchasers of cement, their purchases were more seasonal, sporadic and geographically dispersed than those of the ready mixers (Tr. 2161-62, 2192, 2366).

30. The principal use of portland cement is in the manufacture of concrete; it has no utility by itself (CX 41E, 54, p. 6; Tr. 2104, 2202, 2602). There is no practical substitute for portland cement in the manufacture of concrete (CX 38G, 54, p. 7; Tr. 2104, 2202-03, 2445, 2502; Stipulation re Shaw and Davis, Tr. 2514-15, 2602).

31. In the sale of their product, manufacturers of portland cement consider their competitors to be other manufacturers of portland cement (Tr. 2113, 2367, 2210, 2313). On construction projects, owners, architects and engineers determine what materials will be used. It is

only after that determination is made that contractors, who actually purchase the materials, will solicit bids from the suppliers of the materials specified (Tr. 2113-14). The primary functions of the sales organizations of portland cement manufacturers were the promotion and sale of portland cement. Although salesmen of some manufacturers sold both portland and masonry cements, Universal Atlas, for example, separated portland cement from other cements by organizing two sales departments (Tr. 2118, 2214, 2264, 2369-70, 2390).

32. The price of portland cement was determined on the basis of the value at the mill (mill base) plus freight cost to destination. A manufacturer would determine his price in relation to prices charged by competing portland cement producers in a particular market. If his mill was farther away from the market than that of a competitor but his mill base was the same, he would have to absorb freight in order to remain competitive. Prices were thus determined without reference to the prices of other products (Tr. 2119-20, 2370, 2391-92, 2220). In addition, the lowering of cement prices would not increase the total demand for that product over other products because the demand for cement is derived from the level of construction activity generally and is inelastic (Tr. 2281, 2606).

33. Portland cement is a relevant line of commerce within the meaning of Section 7 of the Clayton Act, as amended, and a relevant product market for purposes of Section 5 of the Federal Trade Commission Act. This conclusionary finding is in accord with previous Commission and court decisions to the same effect, which are, of course, binding on the administrative law judge. *Permanente Cement Company*, 67 F.T.C. 334 (1965); *Diamond Alkali Co.*, 72 F.T.C. 700 (1967); *U.S. Steel Corp.*, 74 F.T.C. 1270 (1968), *rev'd* on other grounds, 426 F.2d 592 (6th Cir. 1970); *Mississippi River Fuel Corp.*, 75 F.T.C. 813 (1969), *affirmed*, 454 F.2d 1083 (8th Cir. 1972); *Missouri Portland Cement Co.*, [1967-1970 Transfer Binder] Trade Reg. Rep. Paragraph 18,805 (1969) [76 F.T.C. 1064]; *Marquette Cement Manufacturing Co.*, 75 F.T.C. 32 (1969); *OKC Corp.*, 77 F.T.C. 1342 (1970), *affirmed*, 455 F.2d 1159 (10th Cir. 1972). There is nothing in the arguments to the contrary of respondent which indicate that a reversal of these decisions should be made at this time.

34. Ready mixed concrete is a material produced by combining portland cement, aggregates such as rock and sand, water, and occasionally certain admixtures (CX 38F; Tr. 2441, 2502; Stipulation re Shaw and Davis, Tr. 2514-15). Of these essential raw materials, portland cement is the most expensive and no other cement is considered to be a practical substitute (CX 38G; CX 54, p. 7; Tr. 2445, 2502; Stipulation re Shaw and Davis, Tr. 2514-15; Tr. 2602). Portland

cement represents approximately 60 percent of the raw material cost and 35 percent of the total cost of producing, distributing, and selling ready mixed concrete (Tr. 2446-47, 2502; Stipulation re Shaw and Davis, Tr. 2514-15). Coarse aggregate is the second most costly raw material in ready mixed concrete accounting for 25 percent of the raw material cost (Tr. 2447, 2502; Stipulation re Shaw and Davis, Tr. 2514-15).

35. There are three methods by which ready mixed concrete can be produced. In a central-mix operation all the raw materials are completely mixed at the plant, and the concrete, which is ready to be poured at the time it is loaded into the hauling vehicles, is then transported to the point of usage. In a transit-mix operation, the dry ingredients are measured and loaded into the hauling vehicles. Water is added on the way to the job site. Shrink-mixing is the process by which the ingredients are partially mixed at the plant and further mixed at the point of usage (CX 38F, CX 43, p. 32D-2; Tr. 2441-42). The ready mixed concrete produced by any of these methods is delivered to purchasers in a plastic, unhardened state (CX 38Z2; Tr. 2441, 2446, 2517).

36. The equipment used to produce ready mixed concrete consists of conveyors, bins, scale hoppers, and trucks equipped with revolving drum bodies to mix and haul the concrete. This equipment is specialized and cannot readily be used for any purpose other than the production and distribution of ready mixed concrete (CX 38F-G; Tr. 2442-43; Stipulation re Shaw and Davis, Tr. 2514-15).

37. Producers of ready mixed concrete generally do not manufacture and sell any other products (CX 38D, CX 43, p. 32D-2; Tr. 2441, 2501, 2516; Stipulation re Shaw and Davis, Tr. 2514-15).

38. Ready mixed concrete is produced to meet specifications which require the concrete to withstand certain pounds of pressure per square inch. These different pressure levels are known as "strengths." The strength is increased usually by increasing the amount of portland cement per cubic yard of ready mixed concrete to be produced, and reducing the amount of water and/or aggregate. Increased strengths of concrete require the use of increased quantities of portland cement resulting in higher production costs and sales prices. (CX 38I, J; Tr. 2448, 2455-58; Stipulation re Shaw and Davis, Tr. 2514-15, 1862, 1758, 1834).

39. Ready mixed concrete is sold principally to contractors or subcontractors for use in the construction of commercial buildings, schools, residential structures, foundations, sidewalks, bridges and roads. After the concrete is delivered to the job site, the contractor or builder is responsible for putting it in place (CX 38W; Tr. 2449, 2503, 1682, 1730, 1732; Stipulation re Shaw and Davis, Tr. 2514-15).

40. On sizeable construction projects, architects and structural engineers, together with the owners, determine which building material will be used and the specifications are submitted to general contractors for bids. The general contractor in turn receives bids from suppliers of the designated materials. Where the use of concrete is specified, only ready mixed concrete companies will compete for that portion of the project. Whenever concrete was required on any project in the KCMA, contractors and builders obtained their concrete almost entirely from ready mixed concrete producers (CX 38W, X; Tr. 2451-52, 2454; Stipulation re Shaw and Davis, Tr. 2514-15, 1728-30, 1887, 1773).

41. In the KCMA, all ready mixed concrete producers competed with each other for both commercial and residential jobs with the exception of very large construction pours which could be handled only by the larger multiplant companies (Tr. 2449-51, 2485-86, 2503, 2510, 2574, 1682, 1735, 1916-23, 1862-63, 1884). However, when identifying their suppliers, contractors specified both small and large concrete companies (Tr. 1818-20, 1937-41, 1863-67). Furthermore, small ready mixed concrete producers considered themselves to be in competition with the larger companies (Tr. 2504-05, 2522, 2548, 1906-07, 1922-23).

42. Producers of ready mixed concrete are not influenced in their determination of prices to be charged for their product by price changes of other building materials (Tr. 1755, 1856).

43. Ready mixed concrete companies have standard day-to-day prices which usually apply to their smaller classifications of jobs. On most other jobs, ready mixed concrete is generally priced on an individual quotation basis. The price quoted by producers is influenced by the cost of materials, the specifications of the job, the size of the job, the distance from producing plants and the expected price of competitors (Tr. 2452, 2456, 2462-63; Stipulation re Shaw and Davis, Tr. 2514-15; Tr. 1700, 1710-12, 1728-32).

44. Ready mixed concrete producers in the KCMA produce concrete of equal quality. Price is the primary basis of competition between them and is the principal determinative factor in the sale of ready mixed concrete. During 1961-1968, a price differential of 25 cents or less per yard could have caused a customer to switch suppliers (CX 38Z3-4; Tr. 2458-60; Stipulation re Shaw and Davis, Tr. 2514-15; Tr. 1712, 1936, 1822, 1862, 1879, 1753, 1758).

45. Other factors which may influence the selection of a concrete supplier are the ability to provide good service, prompt delivery, terms of payment offered and business relationships (CX 38Z4; Tr. 2453, 2458-60; Stipulation re Shaw and Davis, Tr. 2514-15; Tr. 1753, 1937, 1942).

46. Producers of ready mixed concrete considered themselves

members of the ready mixed concrete industry. Ready mixed concrete producers in the KCMA formed a trade association (Tr. 2463; Stipulation re Shaw and Davis, Tr. 2514-15).

47. The Bureau of the Census of the U.S. Department of Commerce has recognized ready mixed concrete as a separate and distinct industry and has assigned it a separate Standard Industrial Classification code (CX 43 and 99).

48. Ready mixed concrete is a relevant line of commerce within the meaning of Section 7 of the Clayton Act, as amended, and a relevant product market for purposes of Section 5 of the Federal Trade Commission Act. This conclusionary finding is also supported by the various Commission and court cases cited above in Finding 33. The respondent makes several arguments to the effect that the larger multiplant ready mixed companies do not compete with smaller single plant operations. It is true that the multiplant operations get the bigger jobs; however, there is ample evidence of competition among all ready mixed companies requiring that such argument be rejected. Respondent presents nothing else that would cast any doubt upon the prior Commission and court decisions involving this same line of commerce.

Section of the Country

49. The complaint alleges that the effects of the merger "may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of (1) portland cement and (2) ready mixed concrete in the United States as a whole and various parts thereof, including the Kansas City area, * * *" The evidence, however, was primarily directed to establishing the effects in the Kansas City area. The Kansas City area was defined in the complaint as consisting "of the Counties of Cass, Clay, Jackson and Platte, Mo., and the Counties of Johnson and Wyandotte, Kans." Respondent urges that the six counties surrounding Kansas City, Mo., and Kansas City, Kans., are not a realistic market area within which to measure the effects of the merger upon the sale of either portland cement or ready mixed concrete.

50. Portland cement is not generally shipped more than 300 miles from the location of the mill in which it is produced, except where water transportation is available. Consequently, the geographic markets served are limited because of portland cement's high shipping cost in relation to its low product value and high product weight (CX 54, pp. 12, 13; Tr. 2120-22, 2150, 2158, 2164-65). Metropolitan markets have been recognized as important markets for the distribution of portland cement because of the concentration of population and the resulting construction activity and the continuous portland cement demand and consumption. These metropolitan markets include such

cities as Kansas City; Topeka, Kans.; Lincoln and Omaha, Nebr.; Oklahoma City and Tulsa, Okla. (CX 96C, 39E; Tr. 2122-24, 2317-22).

51. Metropolitan markets differ since the various producing companies shipping portland cement into the various markets will differ depending upon the location of their plant and prices vary from one metropolitan market to another. Competing suppliers of portland cement must offer timely delivery of their products since ready mixed concrete producers, the most important class of portland cement customers, have limited storage facilities. Unless a mill is within a metropolitan area, such as Kansas City or located nearby, it will generally have a distribution terminal to which the portland cement is shipped and then reshipped to the customer promptly upon the receipt of orders (Tr. 2122-23, 2228-29, 2322-23, 2392-94, 2191-92, 2126-27, 2317-18, 2396).

52. The Kansas City marketing area (KCMA) as defined in the complaint consumed substantial quantities of the shipments made by those competitors which had mills or terminals located within it. In 1965, 49.4 percent of all shipments made by the Sugar Creek, Mo., mill of Missouri Portland Cement Company were made to destinations located within the KCMA. In the same year, 31.6 percent of all shipments made by the Bonner Springs, Kans., mill of Lone Star Cement Corporation were made to customers located within the KCMA. In 1965, respondent, Universal Atlas Cement Division of U.S. Steel, General Portland Cement Company and Mississippi River Corporation, each operated a distribution terminal within the KCMA. In that year, 86.7 percent, and in 1966, 79.9 percent of all shipments from the terminals were made to destinations located within the KCMA. In 1965, 69.5 percent and in 1966, 72.0 percent of all portland cement shipments to all destinations located within the KCMA were made from the Kansas City area mills of Missouri Portland Cement Company and Lone Star Cement Corporation and the Kansas City area terminals of respondent, Universal Atlas Cement Division of U.S. Steel, General Portland Cement Company and Mississippi River Corporation (CX 77, 78, 80; Tr. 2677, 3135, 3253).

53. In 1961, eight companies shipped portland cement to customers located within the Kansas City area. In 1966, these same eight companies and two new entrants were the only companies shipping portland cement to destinations located within the Kansas City area and were the only practicable sources of supply for portland cement recognized by consumers in that area (CX 79, 80; Tr. 2473; Stipulation re Shaw and Davis, Tr. 2514-15).

54. Respondent served the Kansas City area from a mill located at Chanute, Kans., and from a terminal located within the KCMA. In 1965,

6.7 percent of all shipments from respondent's Chanute, Kans., mill were made directly to Kansas City area destinations. In the same year, 87.5 percent of all shipments from respondent's Kansas City, Kans., terminal were made to destinations within the Kansas City area (CX 2C, 6B, 8L, 17H, 18G, 77, 78; Tr. 1625).

55. The Kansas City area was an important portland cement market, consuming 17.3 percent of all shipments by the mills and terminals of the companies serving that area in 1965. The KCMA was defined by portland cement suppliers as the densely populated area surrounding Kansas City (CX 39E, 77, 78, 94; Tr. 959-61, 1625, 2169, 2221-22, 2322, 2373).

56. Prior to the acquisition of Fordyce, Lee's Summit and Union Quarries, respondent recognized a trend towards vertical integration to be occurring within the Kansas City area (CX 18B, 39Q).

57. Respondent considered the KCMA market area, as defined in the complaint, as an important market and outlet for its portland cement production (CX 39E, 96C; Tr. 1648, 1650, 3185, 3268).

58. The Kansas City area, as defined in the complaint, is an appropriate and relevant section of the country within the meaning of Section 7 of the Clayton Act, as amended, in which the effects of the challenged acquisitions in the manufacture and sale of portland cement may be determined, and is an appropriate market for purposes of Section 5 of the Federal Trade Commission Act.

59. The effective marketing area for ready mixed concrete produced from plants within the KCMA vary, but generally do not exceed 25 miles of the producing plant and nearly all of the ready mixed concrete produced by competitors within the KCMA was sold to customers also located within that area. This market is limited by the perishability of the product, transportation costs, delivery time, licensing restrictions, radio communications with delivery units, and service requirements of customers (CX 38Q-R, T, S; Tr. 1753, 1709, 1785, 2502-03, 2517-22, 2542).

60. Some producers of ready mixed concrete located within the KCMA utilized more than one plant so as to get better coverage of the metropolitan area. These producers all identified their competitors as those other producers of ready mixed concrete also located in the KCMA and all producers competed with one another on the basis of price, quality and service (Tr. 1710-12, 2521-22, 2548-49, 2484-85, 2517-18, 2543).

61. The prices at which ready mixed concrete was sold within the Kansas City area are different than the prices in other market areas and were highly competitive and uniformly depressed during the period 1961 to 1965 (Tr. 1623, 1720-21, 1755, 2550-51). During 1965, the

producers of ready mixed concrete within the KCMA consumed 73.5 percent of all portland cement shipped into the area (CX 94).

62. Prior to their acquisitions, Fordyce and Lee's Summit were major competitors in the ready mixed concrete market in the KCMA and Union Quarries sold aggregates in the KCMA and was one of the largest suppliers of aggregates in the area (CX 8P, R, 17C, 37C, 37E, 103).

63. The respondent recognized Kansas City as a separate and distinct market when it purchased Fordyce and Lee's Summit and included in the purchase agreements covenants not to compete within 20 or 30 miles of the Kansas City, Mo., City Hall (CX 23D, G, 32Q and 20C).

64. The Kansas City area, as defined in the complaint, is an appropriate and relevant section of the country within the meaning of Section 7 of the Clayton Act, as amended, in which the effects of the challenged acquisitions in the manufacture and sale of ready mixed concrete may be determined and is an appropriate market for purposes of Section 5 of the Federal Trade Commission Act.

65. Respondent urges that there are other much wider areas which should be included in any attempt to measure the effects of the acquisition insofar as the sale of portland cement is concerned. The thrust of respondent's argument is principally that the suppliers of portland cement to the Kansas City area sell to a much larger area than just Kansas City and that the effect upon competition must be measured through the entire areas of any of the competing cement producers who ship cement. Respondent first starts with a 23-State area into which the various companies supplying Kansas City ship, then reduce this to a 15-State area and then to a 6-State area which include the six contiguous States closest to the Kansas City area and finally to a 2-State, Kansas-Missouri, market (Resp. Prop. Finds. 285, 286, 288, 293). The argument is that the shipments made to the Kansas City area are so small when compared with shipments made to the larger areas that the Kansas City shipments must be considered insignificant or *de minimis*.

66. In the first place, the Commission has had occasion to judge the relevant market for portland cement in several prior cases. In each of these, the finding has been that metropolitan areas are distinct and well-defined local markets within broader geographic markets, and are the relevant markets for the purpose of measuring the effects of an acquisition by portland cement producers of ready mixed concrete producers. *Marquette Cement Manufacturing Company, supra; Mississippi River Fuel Corp., supra; U.S. Steel Corp., supra;* and *OKC Corp., supra.* On appeal, the Sixth Circuit upheld the Commission's

determination in Docket 8655, *U.S. Steel Corp.*, in which the New York metropolitan area was found to be a relevant geographic market for the sale not only of portland cement, but also of ready mixed concrete. *U.S. Steel Corp.* v. *Federal Trade Commission*, 426 F.2d 592, 596 (6th Cir. 1970). Additionally, in *Diamond Alkali Company*, Docket 8572, 72 F.T.C. 700, 716 (1964), the hearing examiner found that a metropolitan area was "probably the most important single local market," within a well-defined broader market area consisting of 23 counties.

67. In the *Mississippi River Corp.* case, *supra*, both the Commission and the Eighth Circuit Court of Appeals found that the metropolitan areas of Kansas City, Cincinnati and Memphis comprised relevant areas in which to measure the competitive effects of the acquisition for both portland cement and ready mixed concrete. An identical finding was made in the *OKC Corp.* case, *supra*, when it was found that the New Orleans metropolitan area was a relevant submarket within which to measure the effects of the merger. A similar holding was made in the *U.S. Steel Corp.* case, *supra*, which found that the New York metropolitan area constituted a relevant submarket which was approved by the Sixth Circuit Court of Appeals. Consequently, respondent's contentions that the Kansas City area is not an appropriate market are rejected.

Effects of the Acquisitions Portland Cement

68. During the period 1961 to 1966, the majority of shipment of portland cement in the KCMA by Ash Grove, as well as other portland cement suppliers, were made to ready mixed concrete companies. Ash Grove's shipments to ready mixed concrete companies during that period of time were between 72.8 percent and 82.2 percent of its total shipments in the KCMA market (CX 94).

69. In 1961, the KCMA was served by eight portland cement companies all directly from their plants. In 1962, Ash Grove and General Portland established distribution terminals within the KCMA. In 1963, OKC Corp. entered as the ninth supplier to that area. Universal Atlas established a transfer station in the KCMA during 1964. Mississippi River became the tenth portland cement supplier to the KCMA in 1965 and established a distribution terminal there in that year. There were no entries or exits among portland cement suppliers during 1966 (CX 75, 76, 77, 78, 79 and 80).

70. In 1961, when all portland cement shipments to the KCMA were made directly from the suppliers' plants, concentration was very high. The top two suppliers accounted for 68.1 percent of all portland cement shipments into the KCMA. These suppliers were Lone Star and Missouri Portland whose plants were located in the KCMA. The top

four suppliers accounted for 86.9 percent of shipments into the KCMA (CX 75, 76, 93; Tr. 2250-51).

71. In 1961, delivery of bulk cement by trucks became prevalent and created a demand by KCMA customers for faster delivery. Ash Grove and General Portland reacted to that demand by establishing distribution terminals in the KCMA and thereby reduced the delivery time by truck to their customers. Ash Grove's terminal required an investment of two to three hundred thousand dollars. As a result, both Ash Grove and General Portland increased their shipments into the KCMA and their shares of that market in 1962, whereas the share of the two local suppliers dropped to 61.4 percent (CX 39F-I, 76, 79 and 93; Tr. 2375).

72. Top four concentration of suppliers to the KCMA continued to decline during 1963, 1964 and 1965 even though the identities and positions of the top three remained the same. The fourth ranked position changed back and forth between General Portland and Universal Atlas (CX 93).

73. Vertical integration between portland cement suppliers and consumers in the KCMA began in August 1962, when Ash Grove acquired one-third of the outstanding common and preferred stock of Lee's Summit, the sixth largest portland cement consumer among ready mixers (Ans. Par. 17; CX 83).

74. In 1963, Mississippi River Corp. announced that it had acquired Stewart Sand & Materials Co., the largest ready mixer in the KCMA and the largest portland cement consumer among ready mixers. Stewart consumed 528,000 barrels of portland cement in 1963 or 23.5 percent of all shipments into the KCMA and 31 percent of all purchases by ready mixed producers in that market. Mississippi at that time was building its own cement plant (CX 19B, 39K, 81, 83).

75. In 1964, Ash Grove acquired 50 percent ownership of Fordyce Concrete, Inc., the third largest cement consumer among ready mixers, and Missouri Portland acquired a preferred stock interest in Denny Concrete Co. in return for a 5-year portland cement requirements contract (Ans. Par. 10; Tr. 2506).

76. Missouri Portland, in 1965, acquired Botsford Ready Mix Company which was the second largest cement consumer among ready mixers. Botsford purchased 371,000 barrels of portland cement in 1965 which was 17.3 percent of the total consumed by ready mixers and 12.7 percent of the total shipped into the KCMA (CX 84, 86; Ans. Par. 24).

77. In 1966, Ash Grove acquired the remaining ownership in Lee's Summit and Fordyce. These companies individually were the seventh and third largest cement consumers among ready mixers, consuming 92,000 and 299,000 barrels of portland cement, respectively, in 1966,

which were 4.5 pcercent and 14.6 percent of the total consumed by all ready mixers, and 3.1 percent and 10.2 percent of all shipments into the KCMA (CX 84, 86).

78. At the time of its acquisition, Fordyce represented the largest single remaining ready mixed concrete company and the largest remaining regular purchaser of portland cement in the KCMA market not wholly owned by a cement supplier (CX 83, 84, 86).

79. Also in 1966, Ash Grove acquired certain assets, including quarry sites and equipment. These assets were formerly the Union Quarries Division of Union Construction Company. The business of Union Quarries included the regular purchase of portland cement. Such purchases amounted to 24,000 barrels in 1964, 26,000 barrels in 1965, and 18,000 barrels in 1966 (CX 8-0).

80. The businesses acquired by Ash Grove purchased a total of 409,000 barrels of portland cement in 1966 which was 13.9 percent of the total shipped into the KCMA market (CX 8-0, 80, 92).

81. Sometime during 1967 or 1968, a financial affiliation was created between Monarch and Concrete Materials, Inc. (CMI). Such an affiliation would influence the purchasing patterns of CMI for its portland cement supply. In 1968, CMI purchased 208,000 barrels of portland cement from Monarch which represented 83 percent of its total purchases (RX 56, pp. 12, 13; Tr. 3357, 2389, 2473-74).

82. In May 1968, Lone Star, the third largest portland cement supplier to the KCMA, expended some $500,000 to enter the ready mixed concrete business in the KCMA through internal expansion (RX 30; Tr. 2233, 2241-42).

83. From 1962 to 1968, a trend toward vertical integration developed in the KCMA. During that time, five of the ten cement suppliers to that market became vertically integrated with substantial cement consumers. Three of these did so by acquiring four leading ready mixers, a fourth through a financial arrangement and the fifth by internal expansion. By 1968, the five largest portland cement suppliers were vertically integrated with the five largest ready mixed concrete companies. Ash Grove's acquisitions of Fordyce, Lee's Summit and Union Quarries were a substantial part of that trend (CX 19B; Tr. 1640-43, 2325).

84. Fordyce Concrete purchased between 4.4 percent and 10.2 percent of all portland cement shipped into the KCMA during the years 1961 to 1966. Since 1963, it was the third largest portland cement consumer among ready mixed concrete companies making between 11.0 percent and 14.6 percent of all such purchases (CX 83, 84, 85, 86).

85. Lee's Summit purchased between 3.1 percent and 5.2 percent of all portland cement shipped into the KCMA during the years 1961 to

1966. It consistently ranked as the fifth to seventh largest portland cement consumer among ready mixed concrete companies, purchasing between 4.4 percent and 8.0 percent of all such purchases (CX 83, 84, 85, 86).

86. During the years 1964, 1965 and 1966, Union Quarries purchased 24,000 barrels, 26,000 barrels and 18,000 barrels of portland cement, respectively. These were substantial amounts and would qualify Union Quarries as a large consumer of portland cement in the KCMA (CX 8-0; Tr. 2115-16, 2211-13, 2368-69, 2321).

87. Fordyce, Lee's Summit and Union Quarries each had multiple sources of supply for their portland cement during the years prior to their acquisitions by Ash Grove (Tr. 1669-70; CX 8-0, 87, 88, 89, 90, 91, 92).

88. When a portland cement consumer becomes owned by a portland cement supplier, the latter has the power to foreclose other competing suppliers and the former will, where possible, obtain its portland cement requirements from the parent company regardless of the fact that competing suppliers offer to sell portland cement on a comparable basis of price, service and quality (CX 39L, R, S; Tr. 1635, 1640-43, 2133-39, 2229-37, 2325-26, 2377-82).

89. Competing portland cement suppliers to the KCMA testified about their decline in sales to the acquired companies subsequent to the latter's acquisitions even though they were competitive price, service and quality-wise with the acquiring companies, Mississippi River, Missouri Portland and Ash Grove.

90. Dewey Portland Cement Company had been developing Stewart as a customer and had increased its sales to a high of 70,000 barrels in 1964. When Mississippi River began supplying Stewart in 1965, Dewey's sales were cut in half in that year and completely foreclosed in 1966, 1967 and 1968 (CX 87-92; RX 25, p. 12).

91. In 1965, Universal Atlas sold 92,000 barrels of portland cement to Stewart. Sales declined to 12,196 barrels and 2,940 barrels in 1967 and 1968, respectively. Some sales were made to Botsford in each of the four years prior to its acquisition by Missouri Portland. No sales were made subsequent to the acquisition. Prior to its acquisition by Ash Grove, Fordyce purchased as much as 58,000 barrels. Sales declined to 8,355 barrels and 884 barrels in 1967 and 1968, respectively, and these sales were forced upon Fordyce due to Universal Atlas cement being specified for use on a particular job. Due to the foreclosure from sales, Universal Atlas, one of the Gas Belt plants which had a lower mill base than the plants in the KCMA, and which had supplied the KCMA for 50 years, considered making its own vertical acquisition. Instead, it widened its overall market area, shipping cement to the company's

Green Bay, Wisc., distribution terminal. Such shipments incurred much higher freight costs than shipments to the KCMA and, therefore, returned lower mill net profit. They were necessary, however, to maintain the Independence plant's capacity utilization and thereby avoid the double penalty of lower net profit and higher unit costs (Tr. 2115, 2136-39, 2296, 1733, 3120).

92. Lone Star, with a manufacturing plant located in the KCMA, sold as much as 103,000 barrels of portland cement to Stewart. However, no sales were made during 1965, 1966 and 1967, and only 11,000 barrels in 1968. The experience with Botsford was similar to that with Stewart; namely, no sales in 1967 and nine barrels in 1968. Sales to Fordyce dropped 50 percent in 1967 from 1966 and declined to only 1,000 barrels in 1968. Lone Star continued to solicit after the companies had been acquired and attributed the inability to make sales to the internal power of requiring the acquired companies to obtain their portland cement from their respective parents. Realizing that it was running out of large companies to solicit in the market due to vertical integration, Lone Star chose to respond by becoming vertically integrated itself through internal expansion (Tr. 2232-36).

93. General Portland considered Stewart, Botsford, Fordyce, Lee's Summit and Union Quarries as large consumers of portland cement. It sold as much as 115,000 barrels of portland cement to Stewart, however, sales declined to 25,000 barrels in 1966 and 1967 and dropped to just 2,000 barrels in 1968. Sales to Botsford and Lee's Summit were completely cut off after their acquisitions with General Portland's salesmen being told by those companies that it was a waste of time in continuing to solicit them. Sales to Fordyce declined to 10,000 barrels in 1967. No sales would have been made in 1968 unless General Portland acceded to the demand of Norman Fordyce, President of Fordyce Concrete and also the owner of Fordyce Materials, Inc., an independent ready mixer. General Portland was required to give Fordyce Materials a secret price cut in return for which Mr. Fordyce agreed to buy 32,000 barrels for Fordyce Concrete (CX 87-92; RX 25, pp. 34, 35; Tr. 2369, 2377-79, 2382-83, 2385-86).

94. OKC Corp. entered the KCMA in 1963 with sales of 43,000 barrels of portland cement to Botsford. Sales to that account increased in 1964 to 125,000 barrels. In 1965, when Botsford was acquired by Missouri Portland, sales by OKC fell to 5,000 barrels. No sales were made to Botsford in 1966, and total KCMA sales were 6,000 barrels. OKC withdrew from the KCMA at the end of 1966 (CX 79, 80, 89-94; RX 19).

95. Dundee Cement Company completed construction of a new 45 to 50 million dollar portland cement plant in Clarksville, Mo., in mid-

1967. That plant contained the largest kiln in the world and was highly automated. Dundee had planned to enter the KCMA since it was considered to be an important market and to make the sizeable investment required to construct a distribution terminal there capable of receiving delivery of portland cement by barge, the lowest cost form of transportation. Dundee, in 1967 and 1968, attempted to make sales in the KCMA, but was unable to sell to Stewart, Botsford and Fordyce/Lee's Summit due to their control by competitive cement manufacturers. Dundee was not able to successfully enter the KCMA and consequently no distribution terminal was established (Tr. 2313-15, 2317-22, 2325-26).

96. Concentration among the top four portland cement suppliers to the KCMA, which had been declining, increased from 75.2 percent in 1965 to 81.3 percent in 1966. In 1967 and 1968, Ash Grove increased its market share to 20.1 percent and 19.0 percent, respectively, and became the second largest supplier in the KCMA market. By 1968, the top four (Missouri Portland, Lone Star, Ash Grove, Universal Atlas) concentration was 76.5 percent and the top five (including General Portland) concentration was 85.3 percent. The two nonintegrated suppliers, General Portland and Universal Atlas, which were among the top five in 1965 were no longer there. Three of the 1968 top five, Ash Grove, Mississippi River, Missouri Portland, had vertically integrated by acquisitions of consumers, a fourth, by internal expansion (CX 93).

97. Entry into the portland cement industry is difficult because the manufacture of portland cement is a high fixed cost operation, requiring cement plants to be operated on a continuous twenty-four hour basis in order to achieve the necessary level of capacity utilization for profitable operation. One of the chief entry barriers is the fact that construction of a cement plant costs between $25 million and $50 million depending on the production capacity desired. Distribution terminals vary in cost from $175,000 to $3 million (Tr. 2143-45, 2209, 2226, 2315, 2320).

98. It is, therefore, clear that the KCMA market for portland cement is highly concentrated and entry into that market has become virtually impossible because of the high barriers and the difficulties in penetrating the market as a result of the substantial foreclosure of the market due to the merger trend. Three portland cement manufacturers were directly affected by the various mergers in the KCMA. These were Dundee Cement Company, OKC Corp. and Lehigh Portland Cement Company. Lehigh attempted to penetrate the KCMA in mid-1967, but was forced to change its marketing strategy, including abandoning construction of a distribution terminal in the KCMA. This was attributed to the fact that substantial consumers of portland

cement were removed from the market as a result of the vertical integrations in the KCMA (Tr. 2309-30). OKC Corp. attempted to penetrate the Kansas City market, but after three years it was forced to withdraw from the market. Lehigh who had supplied the KCMA for some time likewise withdrew as a supplier as a result of a vertical integration. In addition, General Portland which had served the KCMA since 1906, described the situation as desperate and considered withdrawing from the market (CX 79-80, 89-94; Tr. 2309-30, 2367, 2385-88, 2422-23).

Ready Mixed Concrete

99. During the period 1961-1966, some 20 ready mixed concrete companies operated at various times in the KCMA. Twelve such companies operated throughout the time period. Two companies began business in 1962, one in 1964, two in 1965 and one in 1966. Two other companies went out of business at the end of 1963 (CX 81, 82, 106).

100. Concentration, during the same period, was very high and had been increasing. The top four ready mixers increased their market shares from 60.5 percent in 1961 to a high of 67.7 percent in 1964, and ended the period with 66.4 percent. Between 1962 and 1966, the identities of the top four companies remained the same, the only change being among the positions in 1962. From 1963 through 1966, there were no changes in positions (CX 81, 82).

101. Fordyce Concrete, which began operations in April 1961, and which developed into a two-plant company serving the Kansas City metropolitan area, was consistently the third largest seller of ready mixed concrete between 1962 and 1966. Fordyce increased its market share from 6.6 percent in 1961 to 14.0 percent in 1966, during which time the overall market increased 28 percent (CX 2C and D; 8N; 38Z6; 81, 82).

102. Lee's Summit was among the largest of the remaining ready mixed companies which competed for the 32.3 percent to 39.5 percent of the KCMA ready mixed concrete market not controlled by the top four sellers in 1961 through 1966. In 1965, the year prior to their acquisitions by Ash Grove, Fordyce and Lee's Summit combined accounted for 18.5 percent of ready mixed concrete sales in the KCMA, and 18.3 percent in 1966 (CX 81, 82).

103. The largest ready mixed concrete companies, with their multiple plant locations, competed with each other as well as the smaller sellers located throughout the KCMA (CX 38R and V; Tr. 2478, 2504-05, 2521-22, 2548, 1906-07, 1916-23, 1823, 1937-41).

104. Ready mixed concrete business is obtained by offering favorable prices, good service and prompt delivery and maintaining

good personal relations with contractors (CX 38W, X, Z3-4; Tr. 2458-60; Stipulation re Davis and Shaw, Tr. 2514-15).

105. Other factors being equal, purchasers of ready mixed concrete will buy from the producer who offers the lowest price per cubic yard. A reduction of 25 cents or less per cubic yard might cause a customer to switch ready mix suppliers (CX 38X, Z3-4; Tr. 2459, 1822).

106. During the period 1961-1966, the overall cost of producing ready mixed concrete in the KCMA had increased. Prevailing prices for ready mixed concrete, however, had not kept pace with the rising costs. This situation resulted in low profitability or no profit at all for ready mixed companies (Tr. 2492-95, 1639-44).

107. By the end of 1966, the three largest sellers of ready mixed concrete in the KCMA, together with Lee's Summit, had been acquired by portland cement suppliers to that market. The acquired companies accounted for 58.5 percent of ready mixed concrete sales in the KCMA (CX 82).

108. Prior to their acquisitions, Lee's Summit was operated as a separate corporation, totally apart from Union Construction Company which operated the acquired quarrying assets as a division. Two of these quarries were at the same locations as Lee's Summit's ready mixed concrete plants (Tr. 1671).

109. Aggregates, such as those produced by Union Quarries, are one of the raw materials used in the manufacture of ready mixed concrete. They are the second most costly raw material accounting for about 25 percent of the total cost of raw materials (CX 111E and 112D; Tr. 2443-44, 2447, 2502).

110. In addition to Lee's Summit's ability to obtain the costliest raw material, portland cement, at less than prevailing market prices, it has the double advantage of obtaining its aggregates from its parent also at a reduced price. The vertically integrated Lee's Summit, therefore, has decisive cost advantages over its nonintegrated competitors, which if passed on in the form of lower concrete prices, could result in prices lower than competitors' costs, and force those competitors out of business (Tr. 2523, 2526, 2551-52, 1686, 1700, 1633-34).

111. The actual effects of the vertical integration in the KCMA is forcefully demonstrated by the history of Fordyce Concrete. Fordyce Concrete began in 1961 with $5,000 cash, leased equipment and property, and lines of credit with sand and rock suppliers. Within a month, Fordyce needed more cash. In less than two years, Fordyce borrowed an additional $150,000 to build up its truck fleet and secure additional working capital in order to pay bills. By 1964, Fordyce had no net worth and could not borrow from a bank. Cash needed was estimated at $600,000 to purchase equipment and furnish the truck

fleet. Fordyce was backed against the wall. At the beginning of 1965, Fordyce was ready to sell and get out of the ready mixed business. This new entrant had to keep borrowing money but had a financial statement which would not warrant a bank loan. Ash Grove purchased Fordyce for $300,000 (CX 19C, 38Z7, 8-12, 14, 17).

112. In the two years subsequent to its acquisitions of Fordyce and Lee's Summit, Ash Grove furnished additional financial aid. Lee's Summit was acquired on Jan. 4, 1966, for $1,250,000 and by Feb. 28, 1966, had been advanced $39,000. Fordyce received advances from Ash Grove in 1967, totalling $1,057,226, which increased in 1968 to $1,654,444.98. Also in 1968, Fordyce increased the KCMA ready mixed capacity by purchasing 39 new mixer trucks (CX 19C, 34, 97I).

113. Another example is Botsford Ready Mix Company. Botsford, the second largest ready mixer in the KCMA, was acquired by Missouri Portland in 1965, during which year it made a net profit of $84,846. Thereafter, that vertically integrated company operated at net losses which increased from $15,789 in 1966, to $75,751 in 1967, and $136,517 in 1968 (CX 82, 114C).

114. Concrete Materials, Inc. (CMI) had consistently been one of the top four ready mixed companies in the KCMA. At the end of 1966, CMI was the largest remaining independent ready mixed company in the KCMA. CMI had come under new management in mid-1963, which in two years was able to bring the company from a net loss of over $145,000 to a net profit of over $92,000. However, with the price of concrete being so low, CMI ended 1968 with a net loss of almost $91,000, and its management was fearful about CMI's ability to meet the drain on its reserves over a long enough period of time (CX 81, 82; RX 12; Tr. 2477-79, 2496, 1643).

115. Clayco Concrete Company and Denny Concrete Company are examples of two ready mixed concrete firms which were forced out of business in 1968 as a result of the low selling prices for concrete and the high production costs. These were independent firms which were not vertically integrated and consequently did not have the advantages which respondent was able to give to Fordyce and Lee's Summit, but were forced to leave the cement business when they ran out of operating capital (CX 81; Tr. 2542-57, 2504-07).

116. Entry into the ready mixed concrete business in the KCMA should be comparatively easy since the cost of the necessary equipment is not prohibitive and concrete technology, while not simple, can be acquired without great difficulty. However, without adequate financing, entry would be very difficult since costs were high and prices and profits were low. Any new entrant would have to take business from its competitors by cutting prices (Tr. 2287, 2303, 2499, 1903, 1914, 1639,

1644). The record makes it clear that as a result of the vertical integration, including the acquisitions of Fordyce and Lee's Summit by Ash Grove, entry would be virtually impossible in view of the fact that the integrated ready mixed companies were able to rely upon the help of a large cement parent company who could disregard profits on concrete sales and advance the concrete companies money when needed and the fact that the cement suppliers were under pressure to utilize their production capacities at a high level and that the large sellers of concrete had added to their truck fleets which further increased ready mixed capacity in the KCMA (CX 19A-C, 38Y, 38Z3, 38Z7-12, 38Z16-17; Tr. 2143-45, 2233-41, 2328, 2386, 1639-44, 1914, 1781-98, 1849-53).

117. When faced with similar situations as demonstrated in this record, the Commission has consistently held in the past that mergers in the same ready mixed market contravene Section 7 of the Federal Trade Commission Act. Such findings have been made in *Marquette Cement Manufacturing Company*, 75 F.T.C. 32 (1969); *Mississippi River Corp., supra*, and *OKC Corp., supra*.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and this proceeding is in the public interest.

2. The manufacture and sale of portland cement and ready mixed concrete are each proper lines of commerce for purposes of this proceeding.

3. The Kansas City market area is a proper section of the country within which to consider the effects of the acquisitions by the respondent found above.

4. The effects of the acquisitions found above may be substantially to lessen competition in the manufacture and sale of portland cement and ready mixed concrete in the Kansas City marketing area.

5. The acquisitions of the stock of Fordyce Concrete, Inc. and of Lee's Summit Ready-Mixed Concrete & Materials Company by Ash Grove Cement Company violate Section 7 of the Clayton Act, as amended.

6. The acquisition of the assets used in the operation of Union Quarries by Ash Grove Cement Co. violates Section 5 of the Federal Trade Commission Act, as amended.

ORDER

I

It is ordered, That respondent, Ash Grove Cement Company, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date this order becomes final, divest, absolutely, subject to the approval of the Federal Trade Commission, all stock, assets, properties, rights and privileges, tangible and intangible, including, but not limited to, all plants, equipment, machinery, inventory, customer lists, trade names, trademarks and goodwill, acquired by respondent, as a result of the acquisitions of the stock of Fordyce Concrete, Inc., Lee's Summit Ready-Mix Concrete & Materials Company, and of the assets used in the Union Quarries quarrying business, together with all additions and improvements thereto and replacements thereof of whatever description, so as to assure that there is established separate and viable competitor(s) engaged in the business of producing and selling ready mixed concrete and aggregates.

II

It is furthered ordered, That pending such divestitures respondent shall not make or permit any deterioration or changes in any of the plants, machinery, equipment, buildings, or other property or assets to be divested which would impair their present capacity or market value.

III

It is further ordered, That none of the stock, assets, properties, rights or privileges required to be divested be transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, Ash Grove Cement Company, or any of its subsidiaries or affiliates or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of voting stock of Ash Grove Cement Company, or any of its subsidiaries or affiliates.

IV

It is further ordered, That with respect to the divestitures required herein, nothing in this order shall be deemed to prohibit respondent from accepting consideration which is not entirely cash and from accepting and enforcing a loan, mortgage, deed of trust or other security interest for the purpose of securing to respondent full payment of the price, with interest, received by respondent in connection with such divestitures; *Provided, however*, That should respondent by enforcement of such security interest, or for any other reason, regain direct or indirect ownership or control of any of the divested plants, land or equipment, said ownership or control shall be redivested subject to the provisions of this order, within one year from the date of reacquisition.

V

It is further ordered, That either (a) for a period of two years from the dates of divestitures of any ready mixed concrete plant or group of plants or other assets required by this order, or (b) for so long as respondent retains, directly or indirectly, a bona fide lien, mortgage, deed of trust, or other security interest in any of the property, plants, or equipment divested, whichever is longer, respondent may provide no more portland cement to that plant or group of plants or quarry operation than an amount, in tons, equal to thirty percent (30%) of the portland cement consumed by the plant or group of plants during the calendar year immediately preceding that in which divestiture is made; provided, however, that if the purchaser elects, and the Commission approves, respondent may supply up to 75 percent of such consumption of portland cement.

VI

It is further ordered, That either (a) for a period of two years from the dates of divestitures required by this order, or (b) for so long as respondent retains, directly or indirectly, such a bona fide lien, mortgage, deed of trust, or other security interest in any of the property, plants, or equipment divested, whichever is longer, respondent shall not sell or deliver, directly or indirectly, ready mixed concrete in the Kansas City area as defined in the complaint.

VII

It is further ordered, That respondent shall not install or operate any additional ready mixed concrete plant in the Kansas City area as defined in the complaint for a period beginning with the date this order becomes final and continuing until two years from the date of the final divestiture required by this order.

VIII

It is further ordered, That for a period of ten (10) years from the date this order becomes final, respondent shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the share capital or other assets of any corporation engaged in the sale of ready mixed concrete or concrete products within respondent's present or future marketing area for portland cement or which purchased in excess of

10,000 barrels or 1,880 tons of portland cement in any of the five (5) years preceding the merger.

IX

It is further ordered, That respondent shall, within sixty (60) days from the date of service of this order, and every sixty (60) days thereafter until the divestitures are fully effected, and every one hundred eighty (180) days thereafter until it has fully complied with the provisions of this order, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the divestiture provisions of this order, and fulfilling its objectives. All reports shall include, among other things that will be from time to time required, a summary of all contacts and negotiations with any person or persons interested in acquiring the stock, assets, properties, rights or privileges to be divested under this order, the identity of each such person or persons, and copies of all written communications to and from each such person or persons.

Respondent shall also submit to the Commission within ninety (90) days of the close of each calendar year a full report of all facts required by the Commission to determine whether respondent is complying with Paragraphs V, VI, and VII of this order.

X

It is further ordered, That respondent provide a copy of this Order to each purchaser of plants and assets divested pursuant to this order at or before the time of purchase.

DISSENTING STATEMENT OF COMMISSIONER MAYO J. THOMPSON

JUNE 24, 1975

Antitrust ranks alongside the flag, motherhood, and sliced bread in the national popularity sweepstakes and undoubtedly deserves much if not all of the vote of confidence it repeatedly receives in the opinion polls. Like all other good things, however, it can be overdone.

The Federal Trade Commission, understandably concerned with a large-scale merger wave that rolled across much of American industry in the boom years of the 1960's, developed a special concern with the way things were going in the concrete industry, the one that makes our building blocks and paves our roads. In brief, the F.T.C. found that the major suppliers to this industry, the leading cement producers, were buying up all their customers, the local ready-mix folks. Economists call such supplier-customer marriages "vertical integration" and worry about the possibility that, after two or three big cement firms have bought up all the ready-mixers in a particular town, price fixing will replace competition all along the line and the price of both cement and concrete will rise to inflated levels.

This is an understandable fear and I have no quarrel with the application of the principle in question to one of the acquisitions this agency has condemned today. Reviewing an order by one of our administrative law judges that would have required Ash Grove Cement to divest itself of three concrete firms it had bought up earlier in Kansas City, the Commission here decides that the acquirer can keep one of them but must give up the other two. The one it is permitted to keep is Union Quarries, a firm that makes roadbed concrete and uses, in its production of that product, less than 1 percent of the cement shipped into Kansas City each year. This amount, says the Commission, is *de minimis* and hence can't, as the statute requires, "substantially" lessen competition in any meaningful economic market. So far, so good.

And the Commission similarly kept its eye on the ball when it affirmed the trial judge's decision that Ash Grove must sell another of these three firms, Fordyce, a purchaser of some 10.2 percent of the cement shipped into Kansas City. One can hardly deny that, if each of the 4 largest cement firms doing business in a given city is allowed to buy a customer holding 10 percent of the local concrete market, other cement producers are going to be foreclosed from at least 40 percent of the total business in town and hence that one of the major arteries feeding into the competitive life-line of that particular market might well suffer some significant amount of clogging. Those are the kinds of numbers that can leave the competition gasping for breath.

My Brethren lose their grip on the realities of the competitive arena, however, when they let their justifiable concern with the probable effects of such a substantial merger spill over onto the third one involved in this proceeding, Ash Grove's acquisition of a small ready mixer called Lee's Summit. This two-plant operation was bought in 1966 for a price of $247,000 and accounts for 3.1 percent of the cement shipped into Kansas City. Its net profits in that year were, as the majority notes, $21,000.

Men of keener discernment than I may be able to see in these numbers a threat to the hydraulics of the Kansas City concrete market but, try as I might, I cannot make it out. To be sure, this market is already concentrated and the law is reasonably intended to deal not just with the kind of monopolization that leaps upon us in great bounds but the kind that enters in small increments and sneaks in on little cat feet in the middle of the night. But 3.1 percent of a market? While many economic phenomena-including monopoly pricing-are said to depend in the last analysis on events transpiring "at the margin," I cannot persuade myself that the Commission has not today shaved it all a bit too close. When the bologna is sliced so thin that it has only one side, there's not likely to be much nourishment in it. And if a profit of $21,000 on an investment of $247,000 represents the fruits of monopoly, then the latter is clearly an overrated grove.

One further point needs to be made here, the matter of allocating this agency's enforcement resources. The F.T.C.'s legal juggernaut has been rolling over these Kansas City transgressions for some six years now, a period longer than the one consumed by World War II. And while a substantial part of the $150,000 in attorney salaries that we have expended on this case to date would probably have been required in any event, surely a lesser sum would have been sufficient if we had elected to challenge only the key acquisition in the case, the one involving the 10 percent market share.

Nor is it an adequate answer to say that, whatever the wisdom of the choice we made in 1966, the costs associated with them are "sunk" now and thus should be ignored. Since there are no *additional* costs to our current budget in making this firm divest itself of two ready-mixers rather than one, the argument is naturally made that we have nothing to lose from making our divestiture order as comprehensive as the law will permit. Not so. Our staff uses our past decisions as guides to the kinds of cases it can expect us to look favorably on in the future. If we let this one pass without disapproval, more like it will surely appear on our calendar again. The final cost of today's decision is thus not the dollars that have been or will be spent on this particular matter but those that will be diverted away from more constructive areas in the years to come. The cost of what we do includes, as our economist friends have been telling us for years, the things our less productive expenditures have forced us to leave undone. The F.T.C. is uniquely qualified, for example, to launch a sophisticated attack on what is clearly the single most damaging offense against the American consumer, price fixing by agreement among ostensible competitors.[1] Yet we have allocated a tiny percentage of our budget next year to this problem, a deficiency that stems not from the overall inadequacy of our total budget but from the priorities we set for the staff in our planning sessions and in the decisions we hand down in the routine course of business.

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[1] See, for example, my review of this problem in "Price Fixing, Consumer Injury, and the Regional Offices," June 28, 1974. As I noted there: "If we assume that these conspiracies raise prices by say 10 percent on the average-a figure that, again, seems fairly conservative in view of the 15 percent to 75 percent figures reported in the few case histories we have seen so far-then we are talking about an aggregate consumer loss here of some $10 billion or more per year." *Antitrust Law & Economics Review*, Vol. 7, No. 2 (1975), p. 96.

I will be departing from this agency soon. If I leave no other legacy here, I hope at least one idea I have advocated will survive, the notion that real economic benefits to the consumer, not legal indignation, will ultimately become the touchstone of our case-selection process. An antitrust case that doesn't promise lower consumer prices, as I have had occasion to say before, is like a cow that doesn't give milk and is too stringy to eat.

Again, I see no consumer nourishment in the divestiture of 3.1 percent of the Kansas City concrete market and would admonish the staff to strike such trivial issues from our future pleadings. This agency has the important responsibility of seeing that competition, the mother of all that gives vitality to the economy of a free nation, is not allowed to perish. With so solemn a duty to attend to, the talented and dedicated men who staff and lead the Federal Trade Commission cannot afford the luxury of picking economic daisies along the roadside. Alas, we have picked part of one today.

CONCURRING STATEMENT

BY ENGMAN, *Commissioner:*

JUNE 24, 1975

I agree that Ash Grove's acquisitions of Lee's Summit and Fordyce violate the Clayton Act, and I further believe the public interest requires a divestiture order. But I would not be so certain of the public interest if Ash Grove had succeeded in convincing me, as it attempted to do in its brief, that these mergers fostered price competition. As the Commission opinion recognizes, a vertical merger may foreclose a portion of a market, and it may give leverage to discipline unintegrated competitors. Yet a vertical merger may also, in some cases, bring desirable efficiencies to a stagnating market, or inject a dose of needed price competition, and I would be hard pressed to support a divestiture in such a case. While I do not consider Ash Grove's consumer benefit arguments to be irrelevant, I do consider them unpersuasive and I concur in the Commission decision.

OPINION OF THE COMMISSION

BY HANFORD, *Commissioner:*

This matter is before us on respondent's appeal from the initial decision of the administrative law judge, filed Sept. 23, 1974. In that decision, respondent, Ash Grove Cement Company (Ash Grove), was found to have violated Section 7 of the Clayton Act, as amended, with respect to two separate acquisitions, and Section 5 of the Federal Trade

Commission Act, with respect to a third. As to each, divestiture was ordered, along with certain other relief. On appeal, respondent has challenged aspects of the law judge's findings as to liability and remedy in the case of each acquisition. Upon a full review of the record in this proceeding, including extensive briefing and oral argument on appeal, we must modify the initial decision and accompanying order as set forth below.

I

The following factual summary, amply supported by the record, indeed, substantially uncontested, provides a background for our disposition of this case. At the time of the challenged acquisitions, respondent, a Delaware corporation, was principally engaged in the manufacture and sale of lime and portland cement. In varying degrees, the company was marketing its cement in the eight States of Kansas, Missouri, Arkansas, Oklahoma, Texas, Iowa, South Dakota and Minnesota. During the years preceding the acquisitions, respondent's total average annual shipments were in the 5 million barrel range.[1]

Respondent has sold portland cement in the Kansas City area for well over sixty years. It maintains one of its two portland manufacturing facilities in Chanute, Kans., and, since 1962, it has operated a portland cement transfer station in Kansas City, Kans.[2] In the years 1961 through 1966, respondent shipped an annual average of some 404,166 barrels[3] of portland cement in the Kansas City metropolitan area (KCMA),[4] ranking consistently among the top-four suppliers. As a percent of total shipments in the area, this volume ranged from 12.8, in 1961, to a preacquistion high of 18.0 in 1963; in 1966, the year of the challenged acquisitions, respondent's percent of area shipments was 16.6.[5]

In June 1964, Ash Grove purchased 50 percent of the outstanding stock of Fordyce Concrete, Inc. (Fordyce), a Kansas corporation engaged in the manufacture and sale of ready-mixed concrete in the Kansas City area since 1961. On Nov. 8, 1966, the respondent purchased the remaining outstanding shares of Fordyce, thereby gaining total ownership.[6] At that time, Fordyce was operating two ready-mixed concrete plants in the area; and, for the fiscal year ending Jan. 31, 1966, the company demonstrated sales of over $2.8 million, with net profits of $34,910, and total assets of $1,259,003. By the end of 1966 Fordyce was the third ranking ready-mixed company in the KCMA, with 14.0 percent of the market in that year.[7] As a leading factor in the ready mixed market-and the largest, not wholly owned by a cement supplier-Fordyce consumed, in 1966, 10.2 percent of all shipments of portland cement in the market area.[8]

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[1] CX 2B. In comparable years, the nationwide total portland cement shipments by all manufacturers annually averaged some 333,932,000 barrels CX 51 at 6.

[2] The "transfer station," or "distribution terminal," is a producer-controlled local distribution facility of fairly recent advent.

[3] CX 79 and CX 80.

[4] *See* note 17, *infra*.

[5] CX 79 and CX 80.

[6] Ash Grove paid $100,000 for its 1964 purchase of 5,225 authorized but previously unissued shares and, in 1966, paid $300,000 for the then remaining 5,225 shares.

On Jan. 6, 1966, having previously acquired a one-third interest, respondent purchased the remaining outstanding stock in Lee's Summit Ready-Mixed Concrete & Materials Company (Lee's Summit), a Missouri corporation also in the ready mixed market in the Kansas City area.[9] At that time, Lee's Summit was operating two ready-mixed plants in the KCMA. For the fiscal year ending Feb. 28, 1966, the company demonstrated sales of $1,603,751, with net profits of $21,593, and total assets of $459,750. At the time Ash Grove acquired the remaining stock in Lee's Summit, the ready-mixed company ranked seventh in its market, with 4.3 percent of sales in 1966.[10] In that year, Lee's Summit consumed 3.1 percent of all shipments of portland cement in the market area.[11] Subsequently, Lee's Summit operations were merged into those of Fordyce with business continuing under the trade name "Fordyce-Summit."

As a part of the Lee's Summit transaction, Ash Grove also acquired certain real property and an extensive array of quarrying equipment.[12] These assets had evidently been those of a corporation, Union Construction Company, owned by the same individuals who held the outstanding stock in Lee's Summit. It would appear that the assets of Union Construction Company had been distributed to the stockholders; they, in turn, sold them to respondent for $1,050,000. The "Union Quarries" operated these assets in the production and sale of crushed stone and portland cement treated baserock in the Kansas City metropolitan area. The record reflects that in 1966, "Union Quarries" purchased some 17,890 barrels of portland cement, presumably for use in the production of baserock.[13] These purchases were approximately 0.9 percent of the some 2,924,000 barrels of portland cement shipped in the KCMA that year.[14]

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[7] CX 82. In 1964 - the year respondent made its initial stock acquisition in the company - Fordyce was also ranked third, with 13.1 percent of the market.

[8] CX 86.

[9] In 1962, respondent made its initial one-third stock acquisition paying $47,500. The remaining two-thirds were purchased for $200,000.

[10] CX 82.

[11] CX 86.

[12] It could be argued that Lee's Summit and these "Union Quarries" assets constituted but a single acquisition. Both are incorporated into the same purchase and sale contract; both involved the same parties in the buyer-seller relationships; and, it may well be that the purchase of one served as partial consideration for the sale of the other. Nevertheless, the entire record has been built on the theory, set forth in the complaint, that the acquisitions were separate; and since our judgment concerning the competitive significance of the "Union Quarries" arrangement would remain unaltered whether viewed separately or together with Lee's Summit, we are inclined to take the pleadings as we find them on this issue.

On July 8, 1969 the complaint in this matter was issued charging that "[t]he acquisitions by Ash Grove of Fordyce and Lee's Summit and their merger into one operation constitute separately and collectively violations of Section 7 of the Clayton Act, as amended, and the acquisition of the assets used in the operation of Union Quarries constitutes a violation of Section 5 of the Federal Trade Commission Act."

II

A delineation of relevant product and geographic market(s) is a necessary threshold to analysis and evaluation of the likely impact of an acquisition on competition.[15] In the case before us, the administrative law judge determined that there are two product markets ("lines of commerce") relevant to the issue of liability in each of the challenged acquisitions: (i) the manufacture and sale of portland cement; and (ii) the manufacture and sale of ready-mixed concrete. We note, as did the law judge, that such market definitions have been adopted by the Commission in a number of instances in the past.[16] Additionally, the law judge found that the appropriate geographic area ("section of the country") in which to analyze the competitive impact of each acquisition is the "Kansas City metropolitan area" (KCMA).[17] Based upon a consideration of the record, we agree with these conclusions.

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[13] CX 8-o.

[14] Subsequent to the acquisition, Ash Grove conveyed these assets to a newly established subsidiary, Union Quarries, Inc., a Missouri corporation. While the record is silent as to the volume of portland cement consumption by that company after the first quarter of 1967, it does reflect that 234 barrels were acquired in the initial 5 months CX 8-a.

[15] Such a consideration of competitive effect, in turn, provides the base for a determination of legality. Section 7 of the Clayton Act, as amended, provides in relevant part:

> [N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly 15 U.S.C. §18.

This focus on competitive impact is, of course, equally applicable to acquisitions challenged under Section 5 of the Federal Trade Commission Act. *See, e.g., Beatrice Foods Co.*, 67 F.T.C. 473 (1965); *Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962).

[16] *Permanente Cement Co.*, 67 F.T.C. 334 (1965); *Diamond Alkali Co.*, 72 F.T.C. 700 (1967); *U.S. Steel Corp.*, 74 F.T.C. 1270 (1968); *rev'd on other grounds*, 426 F.2d 592 (6th Cir. 1970); *Mississippi River Fuel Corp.*, 75 F.T.C. 813 (1969), *aff'd*, 454 F.2d 1083 (8th Cir. 1972); *Marquette Cement Manufacturing Co.*, 75 F.T.C. 32 (1969); *OKC Corp.*, 77 F.T.C. 1342 (1970), *aff'd*, 455 F.2d 1159 (10th Cir. 1972).

[17] The KCMA is defined, both in the complaint and by the administrative law judge, as consisting of "* * * the Counties of Cass, Clay, Jackson and Platte, Missouri, and the Counties of Johnson and Wyandotte, Kansas." (complaint at 1; initial decision at 14). This geographic market, too, has been previously adopted by the Commission. *Mississippi River Fuel Corp.*, *supra*, note 16.

It was additionally alleged in the complaint that the United States as a whole was, as well, an appropriate

(*Continued*)

Respondent only indirectly challenges the product markets adopted in the initial decision, urging essentially that the administrative law judge's conclusions as to "line of commerce" were not based upon an independent consideration of the record.[18] This contention is buttressed solely by reference to language in Findings 33 and 48 of the initial decision which points out, *inter alia*, adoption of both lines of commerce is "in accord with" and "supported by" prior administrative and judicial decisions to the same effect.[19] Respondent's position completely ignores the wealth of record evidence supporting the adopted market definitions; moreover, it fails to acknowledge a number of quite specific findings made by the law judge leading readily to those definitions.

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." (citation omitted) *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962). In articulating this primary standard, the Supreme Court indicated that even in situations where, by application of this test, a range of products or services might be found to appropriately constitute a broad market for analysis, "* * * within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." The Court provided a number of "practical indicia" for delineating such markets. These include: "* * * industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." (citation omitted)[20]

The manufacture and sale of portland cement was, at the time of the acquisitions, a principal enterprise of Ash Grove, the acquiring firm. This material, a fine gray powder produced by burning and grinding raw materials such as limestone and shale together with gypsum,[21] provides a basic element in the production of concrete. Portland cement

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geographic area in which to measure the competitive effects of the challenged acquisitions. The law judge, however, correctly concluded that the record fails to support such a contention. It is noted that counsel supporting the complaint have not sought to appeal this determination.

[18] We note, in passing, that respondent has cited other "examples" in support of its claim that the administrative law judge generally failed to give the record in this case his independent consideration. *See* respondent's appeal brief at 39-46. We have given this record, now, our own independent evaluation. While differing in certain respects with the law judge, we think it clear that his work has been creditable, as well as independent. We view respondent's contentions to the contrary as wholly without merit; thus, we adopt, and incorporate into our final decision, all findings of the administrative law judge not inconsistent with this opinion.

[19] Initial decision at 8, 12.

[20] 370 U.S. 294, 325. Such markets within markets are meaningful from an antitrust view "[b]ecause §7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), * * * [I]t is necessary [therefore] to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed." (citation omitted) *Id.*

[21] CX 41; transcript at 2103-04.

is never used in construction by itself; rather, as when used in concrete production, it functions as a binder of aggregates.[22]

As the administrative law judge found, portland cement, while classified with other hydraulic[23] cements such as masonry cement, displays distinguishable physical characteristics. Thus, it is markedly heavier than masonry cement.[24] Portland cement prices are distinct from those of masonry cement.[25] As well, there is no indication in this record that the price of portland cement displays a sensitivity, or responsiveness, to the price of any other type of cement. The production facilities required for the manufacture of portland cement are, as a practical matter, unique for that purpose;[26] and competitors within the industry recognize the product as a separate line of commerce.[27] Highly specialized customers, ready-mixed concrete producers, by far account for the greatest quantity of portland cement sales.[28] Most significantly, portland cement's end-use as a binder in the manufacture of concrete is, indeed, unique. The administrative law judge determined, and the record is clear, that "[t]here is no practical substitute for portland cement in the manufacture of concrete."[29] In short, the demand for portland cement is a function of the volume of construction activity underway at any given time and is generally inelastic with respect to the price of other related products. This fundamental inelasticity is sufficient, we think, to meet the broad market standard set forth in *Brown Shoe, supra.* Furthermore, assuming *arguendo* certain other cement types did manifest some cross-elasticity of demand with portland, the presence of virtually all "practical indicia" of a significant antitrust submarket renders the administrative law judge's determination of this issue patently correct.

The facts of record are equally dispositive as to the ready-mixed market. Ready-mixed concrete is produced by combining portland cement with various aggregates, primarily, rock, sand and water. Whether the mixture takes place, in whole or part, in bins and scale hoppers[30] at plant site, or in the revolving-drum trucks so characteristic of the industry, the concrete is mixed to standard strength specifications requiring a given mixture to withstand a specified pressure level. The product tends to be the single item manufactured and sold by ready-mixers;[31] and sales are made principally to construction contractors and subcontractors.[32] While some extremely large construction "pours" are competed for by only multiplant producers, in the main, both large and small ready-mixers are considered by their customers, and themselves, to be in competition.[33] Testimony of record indicates that although price is the primary basis of competition among ready-mixers, fluctuations in price are unrelated to price changes in other building materials.[34] In sum, each of these indicia - the peculiar characteristics and uses of ready mixed concrete; its unique production facilities, specialized vendors and customers; its pricing unrelated to other products; as well as industry and customer recognition of the market - provide abundant support for delineation of the manufacture and sale of ready-mixed concrete as an appropriate line of commerce.

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[22] CX 41E.

[23] A "hydraulic" cement is one which hardens when combined with water.

[24] CX 54 at 4; transcript at 2108.

[25] Transcript at 2205.

[26] CX 41; transcript at 2112, 2209.

[27] Transcript at 2210, 2313.

[28] As respondent pointed out in its 1966 Annual Report: "Within the eight-state area in which we ship cement, the ready-mixed concrete producers are the largest volume users. Approximately, 60 percent of our total cement production went to the ready-mix concrete industry* * *" This was contrasted with direct sales of 23 percent to state and federal large volume construction projects Ash Grove's second-largest customer category. CX 181.

[29] Initial decision at 7. CX 38G; CX 54 at 7; transcript 2104, 2202-03, 2602.

[30] Concrete production facilities are specialized and not readily adaptable to other production uses. CX 38F-G.

Respondent's arguments with respect to the geographic component of the portland cement market are no more compelling.[35] In essence, respondent contends that the administrative law judge erred in adopting the KCMA as appropriate on the grounds that: (i) not all shipments of portland cement in the KCMA originate there; and (ii) certain firms supplying the KCMA also make shipments to locations outside the delineated area. Both of these contentions are correct; however, the argument they are designed to support fails to adequately consider the controlling standard for geographic market definition, as well as significant evidence of record.

The primary task in defining an appropraite geographic market for Section 7 purposes is to determine where the competitive effect of the particular merger under scrutiny will be "direct and immediate." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357 (1963). The Supreme Court has observed that "[t]his depends upon 'the geographic structure of supplier-customer relations.'"[36] More specifically, the Court has indicated that "* * * the 'area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies,' * * *" Id.*, at 359. See *United States* v. *Phillipsburg National Bank and Trust Co.*, 399 U.S.

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[31] CX 38D; CX 43 at 32D-2; Transcript at 2441, 2501, 2514-15.

[32] CX 38W; Transcript at 1682, 1732, 2449.

[33] Transcript at 1818-20, 1863-67, 1922-23, 1937-41, 2504-05, 2522, 2548.

[34] Transcript at 1755, 1856.

[35] Respondent apparently concedes the properiety of the KCMA as an appropriate geographic market for ready mixed concrete. *See* Respondent's Brief on Appeal at 53.

[36] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357 (1963). Indeed, this is particularly true in a vertical merger involving analysis of both supplier and customer product markets.

350, 362 (1970); *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Thus, a "pragmatic, factual approach"[37] requires consideration of the "demand side" of a market, as well as an analysis of supplier behavior. Only then can the geographic market selected "* * * both 'correspond to the commercial realities' of the industry and be economically significant." (citation omitted)[38]

Respondent's endeavor to expand the geographic market adopted by the administrative law judge ignores facts pertaining to very real limitations on the supply options available to portland cement customers. For example, ready-mixers have limited storage capacity for raw materials. As a result, quick delivery from a portland cement supplier is of key importance. The fact that a majority of area suppliers have established production or distribution facilities within the KCMA, at substantial cost, well bears this out. Additionally, apart from crucial time delays involved in shipments from supply facilities more than marginally outside the metropolitan area, the high shipping costs of portland cement, in relation to its low product value per unit weight, soon render incremental distances economically unacceptable.

Respondent's argument does call attention to the behavior of suppliers; however, important facts relating to this aspect of the equation, too, are deemphasized. Thus, while suppliers did sell outside the KCMA, the importance they, themselves, attached to the metropolitan area is noteworthy. For example, Ash Grove's president testified to the importance of the Kansas City market, characterizing it as a market worth protecting.[39] Highlighting the significance of the market area to suppliers is the fact that by 1965, four major suppliers in the market, including respondent, had established local distribution terminals in order to expedite delivery to area purchasers. Indeed, two suppliers actually had production facilities in the metropolitan area. In 1966, 79.9 percent of all shipments from local distribution terminals were made to destinations within the defined market; moreover, as the law judge pointed out, in that year "* * * 72.0 percent of all portland cement shipments to all destinations located within the KCMA were made from the Kansas City area mills of Missouri Portland Cement Company and Lone Star Cement Corporation and the Kansas City area terminals of respondent, Universal Atlas Cement Division of U.S. Steel, General Portland Cement Company and Mississippi River Corporation. (CX 77, 78, 80, Tr. 2677, 3135, 3253)."[40]

Thus, we think a balanced analysis of the "commercial realities" of

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[37] *Brown Shoe Co., v. United States*, 370 U.S. 294, 336 (1962).

[38] *Id.* at 336-7.

[39] CX 39E, R.

[40] Initial Decision at 13-14. We note that a procedure developed recently by Kenneth G. Elzinga and Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Anti-merger Suits*, 18 Antitrust Bull. 45 (1973),

(*Continued*)

the portland cement market support the adoption of the KCMA as an appropriate "section of the country" for purposes of this case.

III

In the case of each of the challenged acquisitions, Ash Grove, the acquiring firm, assumed ownership of a firm which, in the course of its business, was a purchaser of one of Ash Grove's principal products - portland cement. Acquisitions of customers or potential customers, by suppliers, are categorized as "forward vertical" mergers. The "tying" of a customer to a supplier is always suspect from an antitrust perspective;[41] in the event of merger, a permanent tie is established, and the need for analyzing the competitive effect of such a relationship is all the more acute.

When a supplier gains permanent control over the purchasing decisions of a customer, the basic competitive factors of the free market - price, quality and service - are no longer choice-determinative.[42] As the Supreme Court pointed out in *Brown Shoe*, "The primary vice of a vertical merger * * * is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition,' which 'deprive[s] * * * rivals of a fair opportunity to compete.' " (citation omitted)[43] The Court further stated: "Since the diminution of the vigor of competition which may stem from a vertical arrangement results primarily from a foreclosure of a share of the market otherwise open to competitors, an important consideration in determining whether the effect of a vertical arrangement 'may be substantially to lessen competition, or to tend to create a monopoly' is the size of the share of the market foreclosed."[44]

The foreclosure percentages with respect to both acquisitions of ready-mixers here are of significant proportion. As the administrative law judge found, in 1966, Fordyce consumed 10.2 percent of all portland cement shipments in the KCMA;[45] Lee's Summit, a smaller operation,

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demonstrates the need to assess both supply and demand factors to define a geographic market (noted by the Commission previously in *Beatrice Foods Co.*, 81 F.T.C. 481, 524 n. 6 (1972). Elzinga and Hogarty espouse a concise method of defining geographic markets. According to their analysis, if 75 percent or more of the demand for the product in the selected area is met by suppliers in that area and if 75 percent or more of the supply of the product emanating from the selected area is consumed by users in that area, then the geographic market has been properly defined. To state their test briefly, if little enters an area from outside and little leaves the area from inside, that area is a relevant geographic market.

[41] *See Brown Shoe Co.* v. *United States*, 370 U.S. 294, 330-31 (1962).

[42] As Commissioner Dixon has observed in analysis of a similar factual situation: "A substantial share of custom in a market may be obtained by a supplier through contractual exclusivity, not through competition based on offerings of price, quality or service. Competitors of the acquiring supplier may be competitively disadvantaged through permanent foreclosure of custom once open to competitive bidding." *United States Steel Corp.*, 74 F.T.C. 1270, 1289 (1968).

[43] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323-24 (1962).

[44] *Id.* at 328.

[45] Initial Decision at 19. This constituted 14.6 percent of all purchases by ready mixed companies.

accounted for 3.1 percent.[46] Yet, while these figures are, indeed, "important considerations" here and can, in no sense, be considered *de minimis*, there is no *per se* rule of illegality in testing a vertical merger under Section 7.[47] Rather, "[w]hether a particular vertical merger is illegal depends on the facts and the market setting in which it occurs."[48]

Foreclosure manifests a particularly anticompetitive character when it occurs as part of a trend toward forward integration in a concentrated market.[49] For example, in such a situation, barriers to entry, often already high, are raised in the supply market. As the percentage of foreclosed transactions grows, less of an open market remains to attract potential competitors of the integrated suppliers. The would-be entrant is thus faced with the choice of: (i) entering at the supply level to compete for a continually shrinking market dominated by oligopolists; (ii) entering at both the supply and customer levels, facing the significantly increased costs integrated entry implies; or (iii) abandoning all thoughts of entering the market. To create this series of options for a potential entrant is clearly to impede entry.[50]

Nor in such a situation are the anticompetitive effects of forward integration limited to the supply market. The leverage created in the hands of integrated suppliers can all too readily be put to use to discipline, if not eliminate, enterprises competing only on the customer level. This phenomenon was explained in *Marquette, supra:*

> By narrowing the margin between the price at which they sell cement on the open market and the price at which they sell ready-mixed concrete, the integrated firms can limit the profits and growth of the ready-mixed firm, many of which are small, local companies operating only in the NYMA, or perhaps even drive them out of business. It is, of course, unlikely that the integrated companies would utilize their leverage to drive independent ready-mixed firms out of the market. This kind of overt exercise of market power is unnecessary; nor is it essential that ready-mixed firms be kept in a state of complete dependency. All that is required is that unintegrated firms and prospective entrants be made aware of the ability of the integrated oligopoly group - whether acting collectively or simply in "follow-the-leader" fashion - to utilize its leverage. The net effect would be to keep any of the independents from competing too aggressively, to maintain prices above competitive levels, to keep out new entrants - in short, to permit the ready-mixed market to function as a highly concentrated oligopoly. (citations omitted)[51]

In 1966, ten portland cement suppliers were serving the KCMA.

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[46] *Id.* This percentage amounted to 4.5 percent of all purchases by ready-mixed companies.

[47] *See Marquette Cement Mfg. Co.*, 75 F.T.C. 32, 103 (1969).

[48] *Id.* at 103-104.

[49] Brodley, *Oligopoly under the Sherman and Clayton Acts - From Economic Theory to Legal Policy*, 19 Stan. L. Rev. 285, 319 (1967).

[50] *See Marquette Cement Mfg. Co.*, 75 F.T.C. 32, 96-97 (1969).

[51] *Id.* at 102.

Four of those firms, including respondent, shared 81.3 percent of the total market.[52] Thus, the KCMA portland cement market was characterized as a highly concentrated oligopoly. Moreover, the Fordyce and Lee's Summit acquisitions were part of a marked trend toward forward integration into the ready-mixed market. Thus, in 1963, a year after Ash Grove's initial investiment in Lee's Summit, the Mississippi River Corporation[53] acquired Stewart Sand & Gravel Company, the largest ready-mixer in the KCMA — at the time, consuming some 23.5 percent of all portland cement shipments in the market.[54] The following year, Ash Grove made its initial 50 percent investment in Fordyce, the third largest ready mixer. In 1965, Missouri Portland Cement Company, the long-standing market leader, acquired Botsford Ready Mix Company, the second largest consumer of portland cement among ready-mixers with 12.7 percent of total shipments in the market.[55] In 1968, the Lone Star Cement Corporation, long a leading firm in the portland cement market, integrated by internal expansion into the ready-mixed market at a cost of some $500,000. In short, the Fordyce and Lee's Summit acquisitions took place in the concentrated oligopoly of portland cement manufacture and supply in the KCMA, a market in the process of integrating forward into the manufacture and sale of ready-mixed concrete, the business of its principal customer. Once the Fordyce and Lee's Summit operations had been fully taken over by Ash Grove, integrated suppliers in the market controlled some 58.5 percent of ready-mixed concrete sales in the KCMA[56] and had, by vertical integration, "captured" over 40 percent of the total portland cement market.[57]

In this context, we conclude that Ash Grove's two ready-mixed acquisitions, in the long run, can have none other than an effect on competition proscribed by Section 7 of the Clayton Act.

We must, however, take a different view of the "Union Quarries" transaction. In 1966, "Union Quarries" was in the business, *inter alia*, of producing and selling portland cement treated base rock. This required making certain purchases of portland cement; and, of course, the extent of those purchases constituted some foreclosure of the overall portland cement market. As pointed out above, the record indicates 1965 purchases by "Union Quarries" of some 17,890 barrels. This amounts to less than 0.9 percent foreclosure.[58] While we do not rule that such a small percentage will be in all cases insignificant,[59] the record here fails to demonstrate that in this particular situation any effect on competition, in any market, would be other than *de minimis*.[60] We therefore reject the administrative law judge's conclusion that "[t]he acquisition of the assets used in the operation of Union Quarries by Ash Grove Cement Co. violates Section 5 of the Federal Trade Commission Act, as amended."[61] The order will be modified accordingly.

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[52] The record reflects that while there had been some slight decrease in four-firm concentration in the years preceding the acquisitions, there was an increase between 1965 and 1966 (CX 93); moreover, at no time in the five year period prior to the acquisitions could the market be characterized as less than "highly concentrated." (CX 94).

[53] While Mississippi River Corp. was not a factor in the supply market prior to the Stewart acquisition, by 1966, having entered as an integrated firm, it ranked among the top four (CX 93).

[54] CX 85. This figure amounted to 31 percent of all purchases by ready-mixers.

[55] CX 86. This was 17.3 percent of total ready-mixer consumption.

[56] CX 82.

[57] CX 86.

IV

In the notice of contemplated relief issued with the complaint in this matter, the Commission sought to provide for divestiture of the challenged acquisitions, together with the imposition of a limited-duration ban on any further acquisitions of ready-mixers by respondent. The administrative law judge, in rendering his initial decision, augmented these provisions with: (i) a post-divestiture limitation on respondent's sales of portland cement to the divested firms;[62] (ii) a moratorium on ready-mixed concrete sales or deliveries by respondent into the KCMA;[63] and (iii) a ban on respondent internally expanding, or in any sense operating, as a competitor in the ready-mixed market in the KCMA for at least two years after divestiture.[64] On appeal, respondent has objected to the inclusion of these three provisions in any final order we may issue here.[65]

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[58] Indeed, incomplete data for 1967 suggest a far smaller amount purchased in the year after the acquisition. CX 8-0.

[59] We note that in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), one of the product lines in which a violation was found to have occurred involved only 1 percent foreclosure.

[60] Unlike the portland cement and ready-mixed concrete markets, in which "Union Quarries" has no discernible effect, there is no "portland cement treated base rock" market described in these proceedings; nor is there sufficient data to analyze "Union Quarries" in terms of backward integration by a ready-mixer into aggregates supply.

[61] Because of our disposition of this acquisition on the merits, it is unnecessary to pass on respondent's jurisdictional contentions. We note, however, that the Commission's power to challenge noncorporate acquisitions under Section 5 is well-settled. *Dean Foods Co.*, 70 F.T.C. 1146 (1966); *National Tea Company*, 69 F.T.C. 226 (1966); *Beatrice Foods Co.*, 67 F.T.C. 473 (1965); *Foremost Dairies, Inc.*, 52 F.T.C. 1480 (1956). Its Section 5 power to order divestiture is equally clear. *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1 (7th Cir. 1971); *Golden Grain Macaroni Co.* v. *FTC*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973).

[62] Initial Decision at 31 (Par. V).

[63] *Id.* at 32 (Par. VI). The law judge would order that this restriction, as well as that contained in Par. V, be maintained for two years after divestiture, or so long as respondent retains a security interest in the divested property, whichever is longer.

[64] *Id.* (Par. VII).

[65] Respondent has also challenged that portion of paragraph I of the law judge's order which would require divestiture of the "Union Quarries" assets. In light of our disposition of that aspect of this case, *supra*, respondent's objection to paragraph I is moot. That portion of paragraph I relating to "Union Quarries" is not made a part of our final order.

We are unable to find an adequate basis in this record to justify these additional provisions.[66]

In support of limiting respondent's sales to Fordyce and Lee's Summit for a period following divestiture, counsel supporting the complaint argue that there has been a prolonged "block-out of competitive effort"[67] in portland cement sales to the acquired ready-mixers. Simple divestiture will not be sufficient, so the argument runs, to eliminate the foreclosures which have long been maintained, and reinforced, by trading habit as well as corporate structure. This argument is not unreasonable on its face; and, indeed, it may be compelling in other market contexts - or on a stronger record demonstration of necessity. We think, however, in the case of a homogeneous product such as portland cement, in a market admitted to manifest price competition, there appears little reason to foreclose respondent from any segment of that market. In this context, customers, even those newly severed from a parent, can be expected to buy from the supplier making the best price and offering the best service. Without a clear showing that this is not likely to occur in absence of the proposed competitive restriction, we are unwilling to order it here.

The argument advanced for keeping respondent out of the KCMA ready-mixed market for a time is equally unpersuasive. When asked during oral argument to cite record evidence justifying the competitive prohibitions of Paragraph VI and VII of the law judge's order, counsel supporting the complaint could allude only to testimony of ready-mixers to the effect that a vertically integrated competitor puts an "independent" at a competitive disadvantage. While we receive such testimony as credible, we fail to see how it renders the order provisions in question in any way related to the offenses found. More importantly, we are simply at a loss to discern what relationship these provisions could bear to restoring the state of competitive vigor the market might have enjoyed but for the illegal acquisitions.

In the instant case we conclude that paragraphs V, VI and VII of the administrative law judge's order, on the record before us, have not been demonstrated as necessary to effectuate relief in this matter. Accordingly, these provisions are not made a part of our final order.

V

It remains for us to dispose of respondent's contention that the issues in this case were prejudged by the Commission in "an unauthorized trade regulation rule proceeding." In what must be considered a gross misconstruction of the Commission's involvement in the cement industry,[68] respondent raises the question of prejudgment for our consideration yet a third time. Respondent puts forth no new argument to convince us that the Commission erred in deciding "prejudgment" in its Interlocutory Opinion and Order in this matter, Oct. 14, 1969.[69] Nor has any reason been suggested for abandoning the Commission's subsequent determination in response to respondent reraising the issue, along with its ill-conceived "*ultra vires*" argument, Dec. 5, 1972.[70] Finally, there is absolutely no indication that the current Commission, or any of its membership, has prejudged any issue in this case or shown bias in any way since the issue was last resolved. In short, the respondent's contentions as to prejudgment and Commission bias were baseless when previously adjudicated, and they are baseless now.

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[66] In *Papercraft Corp.* v. *FTC*, 472 F.2d 927 (7th Cir. 1973) the Court of Appeals pointed out that while "* * * divestiture orders have included special provisions designed to insure the survival of the divested business, * * *" it is "essential" that such orders be based upon supporting findings which demonstrate "* * * the need for a special protective provision." (citation omitted) *Id.* at 931-32. We are unable to glean such findings from the record before us.

[67] Transcript of Oral Argument at 54.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent's counsel from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having denied, in part, and granted, in part, the appeal; accordingly,

I

It is ordered, That respondent, Ash Grove Cement Company, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date of this order becomes final, divest, absolutely, subject to the approval of the Federal Trade Commission, all stock, assets, properties, rights and privileges, tangible and intangible, including, but not limited to, all plants, equipment, machinery, inventory, customer lists, trade names, trademarks and goodwill, acquired by respondent, as a result of the acquisitions of the stock of Fordyce Concrete, Inc. and Lee's Summit Ready-Mix Concrete & Materials Company, together with all additions and improvements thereto and replacements thereof of whatever description, so as to assure that there is established one or more separate and viable competitors engaged in the business of producing and selling ready-mixed concrete.

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[68] *See, e.g.*, Respondent's Brief on Appeal at 47-52, *passim*.

[69] *Ash Grove Cement Company*, 76 F.T.C. 1076 (1969).

[70] *Ash Grove Cement Company*, 81 F.T.C. 1051 (1972).

II

It is further ordered, That pending such divestitures respondent shall not make or permit any deterioration or changes in any of the plants, machinery, equipment, buildings, or other property or assets to be divested which would impair their present capacity or market value.

III

It is further ordered, That none of the stock, assets, properties, rights or privileges required to be divested be transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, Ash Grove Cement Company, or any of its subsidiaries or affiliates or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of voting stock of Ash Grove Cement Company, or any of its subsidiaries or affiliates.

IV

It is further ordered, That with respect to the divestitures required herein, nothing in this order shall be deemed to prohibit respondent from accepting consideration which is not entirely cash and from accepting and enforcing a loan, mortgage, deed or trust or other security interest for the purpose of securing to respondent full payment of the price, with interest, received by respondent in connection with such divestitures; provided, however, that should respondent by enforcement of such security interest, or for any other reason, regain direct or indirect ownership or control of any of the divested plants, land or equipment, said ownership or control shall be redivested subject to the provisions of this order, within one year from the date of reacquisition.

V

It is further ordered, That for a period of ten (10) years from the date this order becomes final, respondent shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the share capital or other assets of any corporation engaged in the sale of ready-mixed concrete or concrete products within respondent's present or future marketing area for portland cement or which purchased in excess of 10,000 barrels or 1,880 tons of portland cement in any of the five (5) years preceding the merger.

VI

It is further ordered, That respondent shall, within sixty (60) days from the date of service of this order, and every sixty (60) days thereafter until the divestitures are fully effected, and every one hundred eighty (180) days thereafter until it has fully complied with the provisions of this order, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the divestiture provisions of this order, and fulfilling its objectives. All reports shall include, among other things that will be from time to time required, a summary of all contacts and negotiations with any person or persons interested in acquiring the stock, assets, properties, rights or privileges to be divested under this order, the identity of each such person or persons, and copies of all written communications to and from each such person or persons.

VII

It is further ordered, That respondent provide a copy of this order to each purchaser of plants and assets divested pursuant to this order at or before the time of purchase.

Commissioner Thompson dissenting.

In the Matter of

GIFFORD-HILL & COMPANY, INC.*

Docket 8989. Order, June 25, 1975

Complaint counsel's second request that Commission seek an all writs injunction denied.

Order Denying Second Request to Seek Injunction

This matter is before the Commission on the certification by the administrative law judge of complaint counsel's motion entitled "Second Request for Action Pursuant to the All Writs Act." In a prior "Request," counsel supporting the complaint asked the Commission to seek an injunction to prevent the sale of one of the three ready-mixed firms, the acquisition of which is challenged in the complaint in the above-captioned matter. Since the sale had been consummated by the time the matter came before us, we considered the request for an injunction moot, and denied the motion. By this "Second Request," complaint counsel again asks the Commission to seek an injunction pursuant to the All Writs Act, but, in this instance, as to the possible divestiture of all properties subject to the complaint except the ready-mix property which has been divested.

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* For appearances, see p.948, herein.

In support of his motion, complaint counsel has filed an *in camera* affidavit affirming that two persons with affiliations in the cement and concrete business have volunteered information which has led complaint counsel to believe that respondent is undertaking a program to divest all or a portion of the assets which are the subject of the complaint. If the program is carried out, complaint counsel contends the Commission will be denied an opportunity to "approve such contemplated" divestitures, and "an opportunity to order a particular divestiture plan which may identify a preferable purchaser" so as to restore competition in the relevant markets.

By an answer filed June 20, 1975, Gifford-Hill has opposed the "Second Request," arguing that complaint counsel has failed to make a showing that there is "a reasonable probability of an antitrust violation * * * with respect to the acquisition of the companies to be subject to the requested injunction," and, more specifically, has failed to show "that Gifford-Hill has any intention of irretrievably breaking up a formerly 'viable' company." Gifford-Hill does not deny that it is presently engaged in negotiating the sale of the acquired companies.

Even if we assume the truth of what the persons reported to complaint counsel concerning the sale of the properties challenged in the complaint, we are without sufficient facts upon which to base a decision as to whether an All Writs injunction, as requested by complaint counsel, is warranted and should be sought. In the present posture of this matter, the administrative law judge is in a better position to ascertain these facts. If he determines that a program such as is alleged by complaint counsel would make an "effective remedial order * * * virtually impossible,"* it is within the law judge's authority to grant a request for compulsory process if necessary to obtain information that would support a motion for an injunction pursuant to the All Writs statute before the Circuit Court. Accordingly,

It is ordered, That counsel supporting the complaint's Second Request that the Commission seek as All Writs injunction be, and it hereby is, denied.

Commissioner Thompson not participating.

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* *FTC v. Dean Foods Company*, 384 U.S. 597, 605 (1966).

ADVISORY OPINIONS WITH REQUESTS THEREFOR

Advertising and selling as "new" test automobiles used for emission control tests. (File 753 7005)

Opinion Letter

Mar. 7, 1975

Dear Mr. Kirk:

This is in response to your letter of Sept. 16, 1974 requesting the Commission's opinion on the right of automobile manufacturers to advertise and sell as "new" those test automobiles used to demonstrate compliance with air pollution control standards.

Your letter indicates that the Environmental Protection Agency is developing a regulatory program under the Clean Air Act that would require both domestic and foreign manufacturers to select and test annually a statistical sample of production vehicles. The sample would consist of a "few hundred" vehicles per model year per manufacturer.

The proposed test itself requires that each selected vehicle be operated for the equivalent of about fifty miles. Manufacturers would be permitted to accumulate as much as 4,000 miles on each selected vehicle prior to testing if they thought such accumulation necessary to overcome the erratic emission performance that is typical of new engines. The issue is whether manufacturers would have the right to advertise and sell any of these test vehicles as "new."

After careful deliberation, the Commission has determined that it cannot conclude, as a matter of law, that automobile manufacturers have the right to sell such test vehicles as "new." Each manufacturer's testing may raise unique questions. Therefore, the Commission would prefer to defer a more definitive opinion until it receives a request from an auto manufacturer.

By direction of the Commission.

Letter of Request

Sept. 16, 1974

Dear Mr. Tobin:

EPA is developing a regulatory program under the Clean Air Act, as amended, which will require both domestic and foreign automobile manufacturers to demonstrate that production vehicles comply with applicable air pollution emission standards. Because these regulations allow a manufacturer to accumulate up to 4,000 miles on production vehicles selected for testing, we are requesting an advisory opinion based on current FTC rules or decisions as to whether such mileage accumulated in accordance with the proposed program, as outlined below, will affect the right of the manufacturer to advertise and sell such tested vehicles as new automobiles.

The regulations will require a manufacturer to select and test upon request by EPA a statistical sample of production vehicles. Because the EPA testing requirement is imposed on a statistical sample of selected models only, it is anticipated that no more than a few hundred vehicles per model year per manufacturer will require testing based on EPA regulations. Prior to the testing of such vehicles, the manufacturer may, if he so desires, accumulate mileage on the vehicles in order to stabilize exhaust emissions. This provision is intended as an accommodation to the manufacturers who claim that a new vehicle exhibits erratic emission performance during the first few miles of use until the engine and emission control system settle into more predictable operating modes. This phenomenon is sometimes referred to as the "green engine" effect. Such mileage accumulation prior to testing is solely at the option of the manufacturer. We anticipate that, in most instances, manufacturers will elect to accumulate the minimum mileage necessary to perform the emission test which is about 50 miles.

In summary, the EPA regulations will result in new vehicles being required to accumulate mileage prior to being delivered by manufacturers to their dealers. The accumulated mileage may range from a minimum of about 50 to a maximum of 4,000 miles.

Your advice as to the status of such test vehicles as "new automobiles" and the manufacturers' right to sell them as such would be appreciated prior to the scheduled proposal of these regulations within the next thirty days.

Thank you for your cooperation in this matter.

Very truly yours,
/s/ Alan G. Kirk II
Assistant Administrator for
Enforcement and General Counsel (eg-329)

No. 147. Granting of "back-haul" allowances to customers picking up their own orders. (72 F.T.C. 1050, 16 C.F.R. §15.147)

No. 483. "Backhaul" Allowances advisory opinion affirmed. (File No. 683 7026, released Dec. 26, 1973, 83 F.T.C. 1843, 16 C.F.R. §15.483) Clarification of Ruling (File No. 683 7026).

Clarifying Opinion Letter

Mar. 19, 1975.

Dear Mr. Silbergeld:

Your letters of Nov. 8, and Dec. 12, 1974, have been considered by the Commission. The Commission is of the view that a useful purpose would be served by providing brief review and comment relative to the various points that you have raised.

Principally referenced in your initial letter was Commission Advisory Opinion No. 147, issued Oct. 24, 1967, relating to "backhaul" allowances. You characterize that opinion as constituting a form of government "regulation" and suggested, *inter alia*, that the opinion mandates waste and inefficiency in transportation.

Advisory Opinion No. 147 was directed to a rather narrow issue, *i.e.*, whether General Foods Corporation, the company that requested the Commission's opinion, might violate Section 2(a) of the Clayton Act as amended, if it required its rank and file customers to continue to purchase from it pursuant to a uniform zone delivered price system while, at the same time, it offered varying freight-related allowances to "private-carrier" customers positioned to take "dock" delivery. The allowances would vary according to whatever common carrier charge would apply if, in fact, delivery were made to those customers' home locations.

That such deviations in customer pricing could result in illegal price discrimination would seem fairly apparent once the situation is examined. For example, different "private-carrier" purchasers, even though purchasing the same goods, in the same quantities, by precisely the same method - *i.e.* by pick-up in their own trucks at General Food's dock or warehouse, would buy those goods at substantially different net prices under General Foods' proposal. Substantial net price differentials would not only obtain among and between individual "private-carrier" purchasers taking "dock" delivery, but those purchasers would be provided, in turn, varying net purchase price advantages over "delivered-price" customers of General Foods supplied from that same shipping point.

The Commission in connection with its responsibility to enforce the requirements of Section 2 of the Clayton Act, as amended, advised General Foods that, assuming the presence of other elements necessary to a determination of violation of the statute, implementation of its proposal would probably result in a violation of law.

The choice of the basic underlying pricing system, addressed in the opinion, was General Foods'. The issue raised by General Foods was *not* with respect to the merits of its delivered price system but, rather, the legal consequences of particular departures from that system. The Commission's opinion, accordingly, neither operated to approve or disapprove the *premises* on which the matter was presented. The opinion, moreover, did not foreclose the possibility that means to insulate against or avoid illegal discrimination, might be devised. No such measures were subsequently proposed to the Commission however.

In the period following the Commission's 1967 General Foods advisory opinion, it became increasingly apparent that the opinion was being divergently interpreted by the business community as well as other interested individuals and groups. On the basis of representations by a number of interested parties, including the Cost of Living Council and National Commission on Productivity, the Federal Trade Commission very carefully reviewed and reconsidered the matter. On Dec. 26, 1973, it issued a statement to clarify Advisory Opinion No. 147.

Many of the same points that you advanced also concerned the Commission. For example, you observed:

> Nowhere in the Opinion, however, is there any consideration as to whether the "delivered price" system may have anti-competitive or anti-consumer effects by disallowing the implementation of efficiencies which may lower prices to consumers. In fact, nothing in the Robinson-Patman Act or Section 5 of the Federal Trade Commission Act requires use of a "delivered price" system or prevents the supplier from selling goods "F.O.B. plant" * * *.

The Commission, in its clarifying statement of Dec. 26, 1973, addressed some of these very concerns. It announced its intent to scrutinize delivered price systems in the food products industry in order to determine whether they are unfair to customers or to ultimate consumers, and thus violate Section 5 of the FTC Act. It additionally announced in that connection that it intended to develop empirical information on the impact of delivered price systems on food prices. Such an investigation was, accordingly, directed by the Commission.

In its clarifying statement, the Commission also sought to make it clear that although the granting of "backhaul" allowances (based on the customer's actual freight costs) by a seller using a uniform zone delivered pricing system could indeed raise Robinson-Patman questions, a nondiscriminatory option offered by such a seller to all customers to purchase at a true f.o.b. shipping point price, would not.

Some unfortunate confusion has arisen as a result of the Commission's use of the term "true f.o.b. shipping point price." In fact, no question of unlawful discrimination would arise so long as the f.o.b. price is (1) uniform and (2) available to all customers on a nondiscriminatory basis. No legal requirement exists that the alternative f.o.b. price be of any particular amount or computed in any particular way.

The availability to customers of such an option would preclude any legally recognizable competitive injury resulting from any customer's election to purchase at the higher "delivered" price.

Antitrust enforcement is premised on the concept that the self-regulating forces of competition are preferable either to government regulation, on the one hand, or private utilization of economic power, on the other, applied to gain control over, or to apply anticompetitive strictures within, competitive markets. Antitrust, therefore, targets trade practices falling within the latter category. Neither the Commission's Advisory Opinion No. 147 nor its clarifying statement of Dec. 26, 1973 are viewed by the Commission as being "regulatory" in nature.

The Commission's investigation of the food products industry is actively in progress. That investigation is at once multi-faceted and complex. Included within its compass is the impact on prices and the fairness to customers and to ultimate consumers of delivered pricing systems operative in the food products industry. It is not possible at this stage of investigation to specify final completion dates for various phases of this investigation. If and as constraints of an antitrust nature may be disclosed, however, the Commission will take direct and affirmative action. If no such constraints are disclosed, it is not contemplated that the Commission would take any action which would serve to encroach upon the traditional prerogative of sellers to unilaterally determine their own prices and terms of sale.

By direction of the Commission.

Letter of Request

Nov. 8, 1974

Dear Mr. Chairman:

This is a request, in accord with your highly commendable speech in Detroit last Oct. 7, for the Commission to take action to eliminate government-mandated waste in the transportation of goods. As you stated in your Detroit speech, "By the time you get a piece of meat from the pasture to the plate, it carries with it numerous transportation charges." Consumers end up paying these charges, whether they are included in the price of meat for dinner or in the price of ball bearings, metal tubing, electronic devices and other components contained in the refrigerator we use to store that piece of meat.

The Federal Trade Commission's Advisory Opinion No. 147 is a form of government regulation which mandates the kind of waste in transportation which increases the price of the hypothetical piece of meat (and the refrigerator). We hereby request, therefore, that the Commission repeal Advisory Opinion No. 147 and issue a policy statement approving the kind of discount for backhauling which the Opinion now prohibits.

Advisory Opinion No. 147, released Oct. 24, 1967, prohibits a company from receiving any discount from a supplier's "delivered price" if that company uses its own trucks to haul purchased goods from the supplier's warehouse or factory - even though (1) the company may be able to haul the goods more cheaply than the common carrier, and/or (2) the company may realize substantial savings by hauling the goods in trucks which will be in the supplier's vicinity in any event and which now return to the company garage empty because Opinion No. 147 makes such backhauls illegal.

In effect, the Advisory Opinion mandates the wasteful empty return trip plus any savings the company may be able to realize over the cost of carrier transportation. This is precisely the kind of waste which your Detroit speech highlights as inflationary, and this is an opportune time for the Commission to eliminate this cause of waste of transportation facilities and motor fuel resources.

The Advisory Opinion, in fact, concedes that the conclusion it reaches "may seem unreasonable from one point of view" but determines that this conclusion is a necessary result of the supplier's use of a "delivered price" system. Nowhere in the Opinion, however, is there any consideration as to whether the "delivered price" system may have anti-competitive or anti-consumer effects by disallowing the implementation of efficiencies which may lower prices to consumers. In fact, nothing in the Robinson-Patman Act or Section 5 of the Federal Trade Commission Act requires use of a "delivered price" system or prevents the supplier from selling goods "F.O.B. plant" and adding a transportation charge to those customers which utilize common carriers for transportation. The net result is simply an absolute disincentive to efficiency.

I hope that the Commission will be able to act on this request expeditiously and favorably, in the consumer's interest.

Sincerely,

/s/ Mark Silbergeld

Supplemental Letter of Request

Dec. 12, 1974.

Dear Mr. Chairman:

On Nov. 8, 1974, I wrote to you regarding the Commission's Advisory Opinion No. 147, which appears to mandate certain inefficiencies in industrial transportation, while implementing Section 2(a) of the Robinson-Patman Act, as interpreted by the Commission.

While awaiting your reply, I have discovered a Dec. 26, 1973, F.T.C. news release which "clarifies" Opinion 147, seemingly by authorizing the establishment and use of true "F.O.B. factory" prices by sellers which continue to use zone delivered pricing systems. The Dec. 26 statement continues, however, to prohibit allowances for backhaul.

The statement also discloses the Commission's stated intent to:

1. Scrutinize delivered pricing systems in the food products industry in order to determine whether they are unfair to customers or to ultimate consumers, and thus violate Section 5 of the F.T.C. Act.

2. Develop empirical information on the impact on food prices of such delivered price systems which will enable it to make this determination.

In view of continuing double-digit food inflation, the outcome of these inquiries is, obviously, of great interest and significance to consumers. Therefore, I would appreciate it if, in your forthcoming reply to my original letter, you could indicate some approximate target date by which the Commission anticipates that it will be able to take some action on or make some disposition of the delivered pricing system inquiry.

I look forward to your reply with interest, and appreciate your attention to this matter.

Sincerely,

/s/ Mark Silbergeld

Collection and distribution of cost production statistics from and to members in the printing industry. (Docket 459 - United Typothetae of America, et al., 6 F.T.C. 345)

Opinion Letter

Mar. 24, 1975

Dear Mr. Fellman:

The Commission has considered the request in your letter of Dec. 19, 1974, for advice as to whether your client, Printing Industries of America, Inc. (hereinafter referred to as "P.I.A."), may engage in a proposed course of action without violating the cease and desist order issued by the Commission in the above-captioned matter on Aug. 17, 1923. Your letter states that your client, P.I.A., is the successor to United Typothetae of America.

From your letter, it appears that P.I.A. proposes to collect certain statistics and disseminate them to the industry it represents. The proposal is referred to as the "Budgeted Hourly Cost Program" and will be available to both P.I.A. members and non-members. The program will include three basic features: (1) seminars; (2) collection and dissemination of information; and (3) providing computerized data services. In regard to (1), P.I.A. will hold a series of regional educational seminars to acquaint printers with the realities of cost accounting techniques as applied to the printing industry and inform them of the "Budgeted Hourly Cost Program." The seminars will be designed to sell printers the value of accurate cost accounting. In regard to (2), members joining the program will provide basic cost data. This data will be compiled on a regional basis and average regional costs will be developed. Such costs will be returned to the members for comparison purposes. In regard to (3), P.I.A. will transmit the sheets containing the members' basic cost data to a computer service company for processing. P.I.A. will receive back a printout by the computer of the Budgeted Hourly Cost Comparison Sheets. These sheets will be distributed to the regional affiliate association of members. P.I.A. will encourage the affiliates to hold their own educational seminars in conjunction with the distribution of the sheets. Thus, industry members will be provided "with a method of accurately computing their own costs of operation and with a means of comparing an individual company's cost with an average of the costs that have been reported in the geographic region in which the industry member competes."

The order in Docket No. 459, *inter alia*, prohibits respondent:

> 2. From requiring or receiving from members and others using respondents' uniform cost accounting system, identified and itemized statements of production costs for the purpose of calculating average, normal or standard costs of production and from publishing them to members and the trade generally as "Standard Price List" or "Standard Guide" or association cost or price list under any other name.

On the basis of the facts submitted, you are advised that the Commission is of the opinion that the operation of proposed "Budgeted Hourly Cost Program," particularly the publishing or dissemination to members and others of average costs of production, would violate the order issued in this matter.

By direction of the Commission.

Letter of Request With Exhibits

Dec. 19, 1974

Dear Sir:

We are writing to you on behalf of our client Printing Industries of America, Inc., 1730 North Lynn Street, Arlington, Virginia 22209, and requesting an advisory opinion under Section 3.61(d) of the Commission's Rules of Practice regarding the legality of our client's proposal to collect certain statistics and disseminate the same to the industry it represents.

Printing Industries of America, Inc. (hereinafter referred to as P.I.A.) is the largest trade association in the graphic arts industry. In the United States there are an estimated 35,000 commercial printers of which more than 7000 belong to P.I.A. Industry gross volume annually exceeds 10 billion dollars.

This year P.I.A. celebrated its 87th anniversary. In serving its industry for this period of time, P.I.A. has seen many dramatic changes occur. Computer age technology has had a revolutionary effect in the printing industry. Increased demands for specialty printing has created a large number of printing houses devoting themselves exclusively to areas such as financial printing, label making, computer type setting, binding, business forms, etc.

Today the printing industry, encompassing all facets of the graphic arts, is facing a new challenge.

Eighty per cent of the commercial printers in the United States are small businessmen with less than 20 employees. For these shops to compete against the larger printers, management must be able to fully utilize the new production machinery on the market from both a technical and economic standpoint.

P.I.A. is presently providing members with educational materials on new technical developments. P.I.A. tells its members that equipment is available and that such equipment is designed to function in a stated manner.

However, this information is not sufficient for the small printer. He can review P.I.A.'s material; he can evaluate material provided by the various manufacturers; but he must be able to estimate the operating costs of the equipment in his own shop, and subsequent to purchase, he must have a way of developing cost figures to show whether or not he is using his equipment efficiently.

P.I.A. does not provide its members with a means of making this type of cost analysis at present.

A management profile of the 28,000 printing shops having less than 20 employees would show remarkably similar executive structure. Management would consist of one individual, the owner of the business. This manager is usually a trained technician in printing in contrast to an individual with an M.B.A.

In the graphic arts industry, the owner of a small shop started typically as a pressman or printing salesman. Over the years, he acquires some good "seat of the pants" business knowledge but rarely becomes proficient in cost accounting.

This manager today is trying to compete against larger companies with highly sophisticated management teams. He is competing in a market place characterized by many sellers, most of whom produce similar products. He is competing in an industry with a rapidly developing highly computerized technology placed in an economy attacked by rapidly rising inflation and presently in a period of strong recession. Finally, there is a shortage of paper, his basic raw material.

It is obvious that the small printer needs a quick, simple and yet thorough means of developing and analyzing information as to operational costs.

P.I.A. seeks to meet this need through its proposed "Budgeted Hourly Cost Program."

Although we are of the opinion that the P.I.A. proposed program would not if instituted constitute a violation of the laws administered by the Commission; we request this advisory opinion because of the fact that P.I.A. is the successor to the United Typothetae of America. P.I.A. was created 29 years ago and has not, to our knowledge been named as a party in any antitrust suit by the F.T.C. or the Department of Justice during its existence. However in 1923, fifty-one years ago, the F.T.C. entered an order against its predecessor, United Typothetae of America [See F.T.C. v. United Typothetae of America, et. al, Docket 459, 6 F.T.C. 345 (1923)].

Section 2 of the order entered into in that case limits certain statistical collection activities of the Association but not, we submit, the activities proposed herein.

The P.I.A. Budgeted Hourly Cost Program is designed to provide industry members with a method of accurately computing their own costs of operation and with a means of comparing an individual company's cost with an average of the costs that have been reported in the geographic region in which the industry member competes.

We emphasize that no information with regard to prices will be part of this program. No statistics will be gathered with regard to profit, profit ratios, prices, sales, cost ratios relating to gross sales volume or any other factor that would enable one to use this program to determine industry price levels.

The program will be available to both P.I.A. members and non-members.

The program includes three basic features:

(1) Seminars
(2) Collection and dissemination of information
(3) Providing computerized data services.

If the program is implemented, P.I.A. will hold a series of regional educational seminars to acquaint printers with the realities of cost accounting techniques as applied to the printing industry and inform them of the Budgeted Hourly Cost Program. These seminars will be designed to sell printers the value of accurate cost accounting.

If the program is implemented, P.I.A. will begin the collection of basic data. All data collected will be kept confidential. No one competitor will be provided with data submitted by another competitor.

Basic data will be collected via the Specification Sheets attached hereto as Exhibits "A" and "B." As explained by the definitions contained in Exhibit "C" in connection with data development, P.I.A. expects that it will lean heavily on its regional affiliates. As a federation of regional associations, P.I.A. is composed of individual company members who enter P.I.A. by joining one of its regional affiliates. P.I.A.'s regional managers are in direct contact with members and have indicated widespread grass root demand for this type of a service. The proposed program would work as follows.

In calculating individual company budgeted hourly costs based on their actual company information, P.I.A. will undertake the following:

1. Though direct mail, periodicals and meetings programs, P.I.A. will make the availability of this service known.

2. Printing companies that register for the program will be sent sufficient P.I.A. Budgeted Hourly Cost Specification Sheets (Exhibit A) to provide information on the cost centers for which they want calculations made. They will also be sent definitions (Exhibit C).

3. The printing company then will send the completed P.I.A. Budgeted Hourly Cost Specification Sheets to P.I.A.

4. The Specification Sheets will be reviewed for completeness and apparent consistency. If the data appears to be correct, it will be sent to a data processing firm for processing. If it appears to be incorrect, it will be returned to the respondent to recheck.

5. When the data is sent to the data processing firm for processing, it will be sent under a code number so that the computer cannot be called on to printout confidential information about any printer except via a code number which will be controlled by P.I.A.

6. The data service will then compute the Budgeted Hourly Cost Comparison Sheets for the individual printing company (Exhibit B).

7. The company data sheets will be forwarded to P.I.A. for review and distribution.

8. P.I.A. will then send the company's Budgeted Hourly Cost Comparison Sheets along with another set of definitions (Exhibit C) back to the company.

9. Participating companies will be encouraged to resubmit data for recalculation of budgeted hourly costs whenever significant changes in costs have been incurred.

The regional managers of the various P.I.A. affiliated associations will meet with P.I.A. headquarters staff and review regional cost problems. Minor amendments to basic forms will be made if necessary to include local requirements.

Members joining the program will provide basic cost data. This data will be compiled on a regional basis and average regional costs will be developed. Such costs will be returned to the member for comparison purposes. This is the second facet of the program.

It is necessary for a program of this nature to be regional as major costs such as labor, rent, electricity, etc. vary substantially in different regions of the country.

Cost centers would obviously have to be limited to the most common pieces of equipment used in an area so that adequate data bases would exist. Once a cost center is designated, information will be compiled to provide regional averages for analysis. P.I.A. will review regional data for completeness and apparent consistency. Following its review of a region's Budgeted Hourly Cost Specification Sheets, P.I.A. will transmit the sheets to a computer service company for processing. The processing will consist of the following:

a. Input of the data from each Budgeted Hourly Cost Specification Sheet into the computer.

b. Mathematical manipulation of the data in accordance with the computer program.

c. Printout by the computer of the Budgeted Hourly Cost Comparison Sheets. (Exhibit B).

The computer printed Budgeted Hourly Cost Comparison Sheets will then be sent to P.I.A. for review and distribution to the regional affiliate association. The affiliate can option either one of two methods of distribution.

a. It can either obtain the computer printout from P.I.A. and reproduce these for distribution among its regional membership; or

b. P.I.A. will print and distribute the information directly to the affiliate's members.

The above will include incorporating definition of terms and an explanation of the use of the averages being provided. (Refer to "Definitions" Exhibit C).

P.I.A. will encourage the affiliates to hold their own educational seminars in conjunction with the distribution of the Budgeted Hourly Cost Comparison Sheets. This facet of the program will enable members to determine how efficiently they are using their equipment.

As was mentioned, the procedures which have been described are similar except for two important points. First, the regional/area averages are compilations of averages from a particular area; whereas, with the company service aspect of the program, the data is based on data developed within and by individual companies.

Second, with regard to area averages the data will be distributed to any and all interested companies. Distribution of individual company data will be restricted to just that company.

It is the belief of P.I.A. that implementation of the proposed program will strongly aid competition by providing the smaller printer with the economic analysis presently available to the larger printer.

As the state of our economy is such that this information is becoming more and more necessary daily, it is respectfully requested that the Commission give this matter top priority. The printing industry is the third biggest private employer in the nation based on U.S. Department of Commerce statistics and as this program is designed to primarily benefit more than 80 percent of that industry, it has sufficient importance to the economy to justify immediate consideration by the Commission.

We have been requested by our client to inform the Commission that any additional information or explanation requested will be provided immediately in an effort to expedite this matter.

Should any such additional information be necessary, it would be appreciated if contact be made with the undersigned or Jerald A. Jacobs of this firm.

Very truly yours,

COUNIHAN, CASEY & LOOMIS

/s/ Steven John Fellman

Exhibit "A"

PIA Budgeted Hour Cost Specifications Sheet

1. Cost Center Name ______________
2. Description ______________
3. Crew complement to be built into rate (No. of employees) ______________
4. No. of productive hours available, one shift ______Hrs. Wk.______________
5. No. of hrs. over ______hrs. per wk., per shift, in computations______________
6. No. of shifts to be used in computations ______________
7. Investments in profit center, equipment only ______________
8. Investments in profit center, peripheral equipment ______________
9. Method and rate of depreciation: ______yr. life ______________
10. Floor space, total square feet ______________
11. Total horsepower of all motors ______________
12. Direct labor: ______Employee @ ______; ______Employee @______________

_____ Employee @ _____; _____ Employee @ _____________

_____ Employee @ _____; _____ Employee @ _____________

13. Overtime cost over _____ hr. per week, time and one-half _____________
14. Supervosory Labor: _____% of Line 12 _____________
15. Indirect Labor: _____% of Line 12 _____________
16. Vacation Pay, _____ weeks per employee _____________
17. Holiday Pay, _____ days per employee _____________
18. F.I.C.A. Taxes: _____% on first _____ earnings _____________
19. U.C., W.C. Insurance _____________
20. Group Insurance _____________
21. Pensions _____________
22. Gas (Rate: _____ per 100 cu. ft.) _____________
23. Light and Power: (Rate _____ per KWH) _____ KW Hours _____________
24. Direct departmental supplies and expenses _____________
25. Spoilage: _____% of value of production _____________
26. Repairs: (2% of investment per shift or actual) _____________
27. Machinery and equipment taxes: _____ per _____ _____________
28. Machinery and equipment insurance: _____ per _____ _____________
29. Building and heat (rent): (_____ per sq. ft. per year) _____________
30. Mfg. Admin. & Gen. Plant Expenses: _____________
31. General Administrative Expenses: _____________
32. Selling Expenses: _____________
33. List _____ no. of actual chargeable hours last year _____________
34. List _____% chargeable hours which you will use as a basis for budgeting this cost center _____________
35. List _____% chargeable hours averaged _____________

BUDGETED HOUR COST COMPARISON SHEET

EXHIBIT B

Date Computed

Center Name: ______________________	BUDGETED HOURLY COST Y/E ________	ACTUAL HOURLY COST Y/E ________	REGIONAL AVERAGE ________
COST CENTER BASE DATA			
Crew complement to be built into rate (No. of Employees)			
No. of productive hours available, 1 shift ______ hrs. wk.			
No. of hrs. over ______ hrs. per wk., per shift, in computations			
No. of shifts used in computations			
Investment in profit center, equipment only			
Investment in profit center, peripheral equipment			
Method & Rate of Depreciation: ______ yr. life			
Floor space, total square feet			
Total horsepower of all motors			
VARIABLE EXPENSES			
Direct labor: ______ Employee @ ______ ; ______ Employee @ ______			
______ Employee @ ______ ; ______ Employee @ ______			
______ Employee @ ______ ; ______ Employee @ ______			
Overtime cost over ______ hr. per week, time & one-half			
Supervisory Labor: ______% of Line 10			
Indirect Labor: ______% of Line 10			
Vacation Pay, ______ weeks per employee			
Holiday Pay, ______ days			
F.I.C.A. Taxes: ______% on first ______ earnings			
U.C.C., W.C. Insurance			
Group Insurance			
Pensions			
TOTAL PAYROLL & RELATED EXPENSES			
Gas (Rate: ______ per 100 cu. ft.)			
Light & Power: (Rate ______ per KWH) ______ KW Hours			
Direct Departmental Supplies & Expenses			
Spoilage: ______% of value of production			
Repairs: (2% of investment per shift or actual)			
TOTAL VARIABLE EXPENSES			

FIXED EXPENSES			
Depreciation (rent), equipment: add ____% for ____ shifts			
Machinery & equipment taxes: ____ per ____			
Machinery & equipment insurance: ____ per ____			
Building & Heat (rent): (____ per sq. ft. per year.)			
TOTAL DIRECT EXPENSES			
Mfg. Admin. & Gen. Plant Expenses: ____% of Line 26			
TOTAL MANUFACTURING EXPENSES			
General Administrative Expenses: ____% of Line 33			
Selling Expenses: ____% of Line 33			
TOTAL ALL INCLUSIVE COST			
STATISTICAL DATA			
VARIABLE COST per chargeable hour based on activity of:			
Actual chg. hrs. last year ____			
Rate used last year			
____ hrs. per yr. + ____ OT hrs. x ____ shifts = ____ hrs.			
x ____% utiliza. = ____ chg. hrs. budgeted			
____ hrs. per yr. + ____ OT hrs. x ____ shifts = ____ hrs.			
x ____% utiliza. = ____ chg. hrs. budgeted			
MFG. COST per chargeable hour based on activity of:			
Rate used last year			
____ hrs. per yr. + ____ OT hrs. x ____ shifts = ____ hrs.			
x ____% utiliza. = ____ chg. hrs. budgeted			
____ hrs. per yr. + ____ OT hrs. x ____ shifts = ____ hrs.			
x ____% utiliza. = ____ chg. hrs. budgeted			
ALL INCLUSIVE COST per chargeable hour based on activity of:			
Rate used last year			
____ hrs. per yr. + ____ OT hrs. x ____ shifts = ____ hrs.			
x ____% utiliza. = ____ chg. hrs. budgeted			
____ hrs. per yr. + ____ OT hrs. x ____ shifts = ____ hrs.			
x ____% utiliza. = ____ chg. hrs. budgeted			

DEFINITIONS

(Refer to Exhibit B for Line Number Correlations)

Line 1.

Crew complement to be built into rate (no. of employees):. . . .For industry area averages purposes this figure may include the prevailing union manning tables, open shop statistics or a combination of the two. For the individual company it should of course be based on actual company manning.

Line 2.

No. of productive hours available, 1 shift hrs. wk. . . . This statistic refers to the standard number of hours in the work week. This figure is variable from company to company in any area. For area average purposes it may represent the standard work week recognized by the union(s) or typical open shops or a combination thereof. For individual companies it should be based on the actual situation existent. It normally excludes vacation and holidays, for the annual total(s).

Line 3.

No. of hrs. over hrs. per wk., per shift, in computations. . . . This item may or may not be included in area average presentation. It is a provision for those circumstances where overtime is involved as a regular matter. For example, a company may guarantee 10 percent overtime to its employees. Under these circumstances this should be taken into consideration in the calculation of budgeted hour cost. For average area practice this factor may not be relevant.

Line 4.

No. of shifts used in computations. . . . This should normally be an exact figure or figures; i.e., one, two and/or three shifts. Frequently more than one condition will be presented and in some cases all three possibilities will be presented.

Line 5.

Investment in profit center, equipment only . . . This item may be the current installed replacement value of the equipment in the cost center factored with a composite of typical companies in an area or based on some other general average situation. In an individual company situation it would typically come directly from company ledgers, although a company could rationalize replacement cost as being more realistic. Whatever method is used, it must be used uniformly.

Line 6.

Investment in profit center, peripheral equipment. . . . This item involves exactly what its title implies, special tables, instruments, etc. It is listed separately because it may be overlooked. The same conditions which apply to item 5 above also apply here.

Line 7.

Method and rate of depreciation: yr. life. . . . The important factor here is that years of life be reasonably reflective of typical practice or the actual company situation. The number of shifts worked is a factor since equipment life is function of wear as well of obsolescence.

Line 8.

Floor space, total square feet. Where space is shared by two or more pieces of equipment this would be prorated among the equipment in question. General aisles and storage space would normally not be included here. Companies should use their actual plant layout as a basis for space allocation.

Line 9.

Total horsepower of all motors. . . . This is derived by adding the horsepowers of all motors operating in the cost center and applying it to this item. The figure will be used in determining Light and Power on Line 22.

Line 10.

Direct labor: _____ Employee at _____; etc. These rates for area average purposes may be based on current union contract conditions or a composite of the area. They should reflect individual plant condition where the plant is attempting to budget its expected costs.

Line 11.

Overtime cost over _____ hr. per week, time and one-half. . . . This item may or may not be included in average area or individual company calculations. This depends on how hour costs are rationalized. Certainly where overtime is worked as a regular matter or is guaranteed, this factor should be included.

Line 12.

Supervisory Labor: _____ percent of Line 10. . . . Supervisory wages are generally applied as a percent of direct labor. This percentage will either be based on typical situations for industry area averages or on actual experience for individual company presentation purposes.

Line 13.

Indirect Labor: _____ percent of Line 10. . . . This item includes miscellaneous labor such as floor handlers of paper, janitorial service and others who should be allocated or who assist in the work of the cost center.

Line 14.

Vacation Pay, _____ weeks per employee. . . . Tnis factor may or may not be included in the calculations depending on whether it is rationalized as part of the hours available for work or not.

Line 15.

Holiday Pay, _____ days. . . . Holidays are treated the same as vacation, i.e., they are normally excluded from the hours available and therefore considered additionally.

Line 16.

F.I.C.A. Taxes: _____ percent on first _____ earnings . . . . This item will be presented in accordance with current federal regulations.

Line 17.

U.C., W.C. Insurance. . . . These rates will be presented according to current area composites or individual company rates.

Line 18.

Group Insurance. . . . This item will be based on typical or specific company program benefits.

Line 19.

Pensions. . . . This item will be based on typical or specific company program benefits.

Line 20.

Total payroll and related expenses. . . . This item is self defining.

Line 21.

Gas (Rate: _____ per 100 cu. ft.). . . . When gas is involved, other than for general heating, this factor must be determined based on anticipated usage.

Line 22.

Light and Power: (Rate _____ per KW11) _____ KW Hours . . . . This factor relates to item 9 plus any specific lighting requirements for the cost center.

Line 23.

Direct Departmental Supplies and Expenses. . . . This item includes things not normally charged directly to customer work; that is, since paper and ink are normally charged directly to customer work and apart from the hour cost, these items are of course not included. Press blankets, packing, paste, etc. probably should be included in this item. The test is if the item is charged directly to the customer it is not included here. If it is associated with the cost center but not directly charged to the customer it is included here.

Line 24.

Spoilage: _____ percent of value of production. . . . Refers to work which must be redone because of errors in preparation or poor quality. It does not cover waste. Waste is concerned with material losses due to normal trimming of paper, machine set up and makeready losses, etc. Waste is normally provided for in the materials section of job estimates.

Line 25.

Repairs: (2 percent of investment per shift or actual). . . . Refers to replacing equipment parts and the labor associated with these replacements. Repairs would cover such things as the replacement of bearings and other integral mechanical parts as opposed to replacement of routine expendables such as press blankets, etc., these latter would be included in supplies, etc.

Line 26.

Total Variable Expenses. . . . This item is just a sub-total of cost elements so far presented.

Line 27.

Depreciation (rent), equipment: Add _____ percent for _____ Shifts. . . . The item for depreciation covers only the equipment involved in the cost center. When the equipment is rented rather than owned, the rental rate may be substituted for depreciation.

Line 28.

Machinery and equipment taxes: _____ per _____ . . . . This item provides for property taxes which are applicable to just the equipment which is part of the cost center. Local or individual company rates should be used.

Line 29.

Machinery and equipment insurance: _____ per _____. . . . This item provides for insurance coverage which is applicable to just the equipment in the cost center.

Line 30.

Building and Heat (rent): (_____ per sq. ft. per year). . . . Determine the total number of square feet in the plant occupied by the production area, and divide the total annual cost of rent and utilities by this figure. In so doing, the cost of footage, lighting, heat, air-conditioning, etc., for all office space, storage areas, wash rooms and such are spread to units of the production department on an equitable basis as well as the cost applicable to the production unit itself. Firms which own their real estate should substitute annual building depreciation for the rent aspect.

Line 31.

Total Direct Expenses. . . . This is just a sub-total of expenses accumulated to this point.

Line 32.

Manufacturing, administrative and general plant expenses _____% of Line 26. . . . This item should cover all other manufacturing expenses which have not been covered by the above items except usually for warehousing. It would include salaries for a production office, the plant executive and his staff, etc., as well as any other items of expense not already allocated. These items are of course to be spread across all cost centers on some equitable basis.

Line 33.

Total Manufacturing Expenses. . . . This item is just another sub-total.

Line 34.

General Administrative Expenses: _____% of Line 33. . . . General administrative expenses are intended to cover all of the general office expenses which are not directly applicable to sales or production. In most cases it would cover the accounting department, the general office staff and probably the chief executive officer and his staff. It would normally cover related salaries, rent, etc.

Line 35.

Selling Expenses: % of Line 33. . . . This item should normally cover all selling expenses; such as salaries, commission, advertising, travel, rent, heat and light, etc., as directly related to the cost of selling.

Line 36.

Total All Inclusive Cost. . . . This item is just a total of all foregoing expenses, but it should include all cost factors except those associated with outside purchases which are charged directly to work.

Lines 37, 38 and 39.

These lines are special calculations which show two things. First, the impact of equipment utilization on hour cost; i.e., the higher the rate of utilization (sold machine hours) the lower will be the hour rates for a cost center.

It is normal to show at least two different rates here. One rate, such as 75 percent would be considered a target rate or one which is considered to be competitive. The second might be based on actual average experience.

The second aspect of these line items is to show the effect of the various cost factors on the budgeted hour rate. Line 37 shows the effect of all so called variable manufacturing costs. Line 38 shows how these rates increase when fixed manufacturing costs are also included. Finally, Line 39 shows the cost when all costs are included.

"Dry-testing" and "bulk-loading" a continuity book series by mail order. (File No. 753 7003)

Opinion Letter

Mar. 27, 1975

Dear Ms. Hunter:

This is in response to the request submitted by Wentworth Press for an advisory opinion concerning the propriety under the Federal Trade Commission Act of "dry-testing" and "bulk-loading" a continuity book series by mail order.

It is the Commission's understanding that Wentworth is an editorial packaging house that prepares the layout and performs other editorial services for publishers who market continuity book series by mail order. Wentworth assists in the preparation of the promotional material for a continuity book series and the book series itself. A continuity book series is a set of multiple volumes, related by subject matter, sent at period intervals to subscribers. Generally, each book is sent on approval, and may be returned by the subscriber. A bill accompanies each book.

Wentworth is considering entering into contracts with marketers which would involve the use of dry-testing various continuity book series. As defined by the requester, dry-testing is a practice in which the marketer disseminates promotional material by mail to members of the general public soliciting subscriptions to a continuity book series, before the books have been published. Whether or not the book series is actually published depends upon the size of the response to the solicitation. Wentworth's first question is whether such dry-testing of a book series is permissible under the Federal Trade Commission Act and rules and regulations promulgated thereunder.

Wentworth's second question involves the legitimacy of "load-ups" through the mail. Under the proposed plan, the marketer would initially send a single volume of the continuity book series to subscribers each month. Each volume would, in effect, be received on an approval basis; subscribers could review each volume individually, and decide whether to accept or reject it. Subscribers would be billed each month for each volume accepted. In a "load-up," the subscriber is notified by the marketer, during the course of the series, that the remaining volumes are available and will be sent at one time in a bulk shipment, if the customer so desires. A customer accepting the bulk shipment would continue receiving monthly bills for individual volumes.

On the basis of its understanding, the Commission does not object to the use of dry-testing a continuity book series marketed by mail order as long as the following conditions are observed:

(1) No representation, express or implied, is made in advertisements, brochures, or other promotional material, which has the tendency or capacity to mislead the public into believing that the books have been or will definitely be published, or that by expressing an interest in receiving the books a prospective purchaser will necessarily receive them.

(2) In all solicitations for subscriptions and other promotional material, clear and conspicuous disclosure is made of the terms and conditions of the publication, distribution, and other material aspects of the continuity book series program. Such disclosure must provide adequate notice of the conditional nature of publication of the book series, *i.e.*, the fact that the book series is only planned and may not actually be published.

(3) If the decision is reached not to publish the book series, due notice is given to persons who have subscribed, within a reasonable time after the date of first mailing the solicitations for subscriptions. The Commission considers four months or less to be a reasonable time, unless extenuating circumstances exist. If the decision on whether or not to publish the book series has not been made within that time period, persons who expressed a desire to subscribe should be notified of the fact that a decision has not yet been reached, and should be given an opportunity to cancel their orders.

(4) There is no substitution of any books for those ordered.

This opinion is not intended to affect the application of any state law which places stricter requirements upon mail order marketers or affords greater protection to consumers.

As to the question regarding the legitimacy of sending the remaining volumes of a continuity book series in a bulk shipment to a subscriber after several volumes have been shipped and billed for singly, upon notice and an opportunity to reject the proposed bulk shipment before it is made, the Commission refers your attention to two recent consent orders: *Cadence Industries Corp.*, C-2508 (Mar. 25, 1974) [83 F.T.C. 1498], and *Crowell Collier and Macmillan, Inc.*, C-2394 (May 1, 1973) [82 F.T.C. 1292]. In these consent orders, the respondents agreed, among other things, to make no representations in promotional material that a participant in a continuity book program has the option of receiving each publication individually, at prescribed intervals, and accepting or rejecting it, unless such is the case. These consent orders also require a clear and conspicuous disclosure to be made in any advertisement promoting the book program of the conditions and terms of the program and the duties and obligations of any subscriber.

By direction of the Commission.

MEMORANDUM TO THE FILE

Dec. 16, 1974

Because of questions which have arisen concerning the factual background underlying the proposed advisory opinion on the legality of dry-testing a continuity book series by mail order, further information was elicited today from Jacqueline Hunter, Vice President of Wentworth Press, Inc. This memo sets forth information provided to me by Ms. Hunter.

Wentworth Press is an editorial packaging house engaging in the preparation of continuity book series for mail order marketers. Marketers enter into contracts with Wentworth which call for Wentworth to prepare the layout, select the type face and paper, and perform other editorial functions. Wentworth performs these services for both promotional material used to promote a book series and the actual book series itself.

In preparing the contracts with marketers, marketers have often discussed with Wentworth the possibility of dry-testing proposed continuity book series. Wentworth, though, is unsure of the legality under the Federal Trade Commission Act of dry-testing. Before Wentworth enters into such contracts, it would like to know whether they would be permissible under the Federal Trade Commission Act, as interpreted by the Commission.

Dry-testing is considered by the applicant to be an efficient way of determining whether to market a continuity book series. It was once a common practice in the industry, but is not now because marketers are terribly unclear as to its legality.

A contract between Wentworth Press and a client, *i.e.*, a marketer/publisher, which would involve dry-testing is contemplated as a two-step contract. The first step would call for testing; it would encompass the editorial preparation necessary for the dry-test, involving preparation of material which comprises the mail order brochure. The second step would be the editorial packaging for the actual continuity book series; this step is activiated by a successful dry-test.

Some marketers test proposed book series by mail. Some advertise in various media.

The response forms which potential subscribers are furnished depends upon the particular marketer. Some marketers use forms which indicate to the recipient that he or she is subscribing to the book series by sending in the response, whereas others merely indicate an expression of interest on behalf of the responder.

Marketers use various mailing lists in testing their products. Generally, they will use a certain number of names from selected lists which they have obtained from various sources. The selected lists represent different prime targets. The tests enables the marketer to evaluate which sectors of the universe of potential subscribers is viable, and which aren't. After responses are received, projections can be made, and the feasibility of marketing the book series determined.

Marketers can generally evaluate whether it is viable to market the product or not within six weeks from the date of mailing solicitations. The components of this time period are as follows: One week elapses from the time the solicitations are mailed until they are all received. Responses are received within the next three weeks. Two weeks are needed to evaluate the responses.

Sixty days from the date of mailing solicitations or advertising is a bench mark figure within which marketers are able to assess the feasibility of marketing a product.* However, marketers sometimes prepare different solicitations. They may receive responses from some lists and not others, and may wish to pursue other names on responsive lists before committing significant resources to publishing and marketing a book series.

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* This time period was disputed by another industry source, in charge of the mail order division of one of the nation's largest and most prestigious publishing companies. He stated that a minimum of 90 days from the date of mailing a solicitation is needed to evaluate a dry-test. Informing subscribers of any decision reached would take additional time.

Jeffrey S. Edelstein

Memorandum to the File

July 31, 1974

Today I spoke with Jacqueline Hunter, Vice President of Wentworth Press, Inc., regarding the request for advice submitted by Mary Otto in her letter of May 6, 1974. I had called the company to clarify terms used in the request for advice.

Ms. Hunter informed me that a continuity book series is a set of multiple volumes sent in periodic mailings to customers that are generally related as to subject matter.

The basic question posed by Wentworth Press is: Can a marketer mail an offering (*i.e.*, brochure) nationally concerning a continuity book series without the books having been published? In "dry-testing" a series, the marketer enters into a conditional contract with the publisher; the contract to publish is conditioned upon the response to the offering. The sales solicitation, therefore, is made before the books being solicited have been published or are subject to an unconditional contract to publish.

Dry-testing is a practice which was apparently very common in the continuity book series mail order business at one time, but has recently fallen into disfavor because of widespread confusion over its legality. Ms. Hunter informed me there are no clear rules to provide guidance to marketers on this matter. Marketers are in need of clarification from the Commission because of the great confusion in the industry. At the same time, the mail order business is on the rise, which compounds existing problems.

On the basis of this conversation, I believe that the Commission should issue a formal advisory opinion to Wentworth Press in regard to the question of dry-testing.

Wentworth's second question involved "load ups" through the mail. In a load up situation, a customer might have ordered the first volume of a continuity book series one month, the second volume the next month, and the third volume the next month. Then the marketer informs the person that the remaining twelve volumes of the series are available and that if the customer desires, these volumes will be sent at once, with the customer billed for one volume each month. A load up, therefore, is the remainder of the set which is sent to the customer at one time but paid for per the original billing agreement.

Jeffrey S. Edelstein

Letter of Request

May 6, 1974

Dear Sir or Madam:

I am writing to you at the suggestion of David Paul in your New York office. We are a book packaging house and are about to embark on a continuity book series. We have conflicting sources of information about dry testing our series and would like to clarify the legality of dry testing a product through the mail. One source of information informed us that there is nothing illegal about this, however another advised us against doing so in accordance with your regulations. Mr. Paul said he knew of no such stipulation but that it should be verified with your office.

Could you also advise us on the legitimacy of "load ups" through the mail. If you have a pamphlet or brochure governing your regulations we would very much appreciate receiving one as soon as possible.

I look forward to your prompt response.

Sincerely,

/s/ Mary Otto

Marking of articles of jewelry made from alloy comprised of one-half gold of 14 karat fineness and one-half silver of at least 925/1000 fineness. (File No. 723 7007)

Opinion Letter

May 6, 1975

Dear Mr. Windman:

This is in response to your request for an advisory opinion regarding the marking of articles of jewelry made from an alloy comprised of one-half gold of 14 karat fineness and one-half silver of at least 925/1000 fineness. You question the correctness of a recent staff opinion concerning the marking of articles of jewelry made of such an alloy. We note at the outset that this staff opinion has been rescinded.

Although an advisory opinion might technically appear inappropriate pursuant to § 1.1 of the Commission's Rules of Practice, 16 C.F.R. § 1.1, the Commission has determined that a resolution of this issue by the Commission at this stage is desirable and accordingly has issued this opinion.

It is the Commission's understanding, on the basis of the representations made, that the alloy as described above is a combination of silver and gold in precise proportions for which a patent is being sought. The resulting alloy may have the general appearance of gold. The question is whether it may properly be identified by a marking "1/2 14K + 1/2 Ster."

The Commission is of the opinion that such a marking would violate the Guide for the Jewelry Industry, 16 C.F.R. § 23.22(c)(1) and 23.23(b). Under section 22(c)(1), only an article of jewelry composed throughout of not less than 10 karat fineness may be described as "gold." Under section 23(b) an article may not be described as "sterling" unless it is at least 925/1000ths pure silver. The marking "1/2 14K + 1/2 Ster.," accordingly, would be in violation of both of those sections of the Guide.

The Commission is of the view, however, that a nondeceptive and commercially acceptable designation and marking of this or other alloys of precious metals might be warranted in the public interest. To that end it has directed that the Bureau of Consumer Protection promptly study this question with a view toward possible amendment of the Guide, if appropriate.

By direction of the Commission.

cc: John J. Ghingher, III, Esquire
Weinberg and Green
Nineteenth Floor
10 Light Street
Baltimore, Maryland 21202

Letter from Office of General Counsel Rescinding Informal Staff Opinion

Mar. 24, 1975

Gentlemen:

This Office has determined, after further study of this matter, to rescind the informal staff opinion rendered to you and Mr. Robert Newman of B. F. Hirsch, Inc., by letters dated Sept. 9, 1974, and Oct. 11, 1974, which approved the marking "1/2 14K + 1/2 Ster.," for articles of jewelry composed of an alloy of one-half 14 karat gold and one-half sterling silver. It is now the view of this Office that the marking in question would violate the Guide for the Jewelry Industry, 16 C.F.R. Part 23. The marking in question would permit the use of the word gold to describe a product composed throughout of an alloy of gold less than 10 karat fineness. *See* 16 C.F.R. §§23.22(b)(2), (a)(1). In addition, it would permit the use of the word sterling to describe an alloy that is not 925/1000ths pure silver. *See* 16 C.F.R. § 23.23(b).

Rescission of the subject staff opinion by this Office is independent of any Commission action on the matter. However, in an effort to obtain formal resolution of the issues raised, including your petition for an amendment to the Guide for the Jewelry Industry, the matter will be presented to the Commission as expeditiously as possible. You will be promptly notified as to the Commission's determination.

Very truly yours,

/s/ Thomas H. Tucker
Assistant General Counsel

Third Supplemental Letter of Request

Feb. 12, 1975

Dear Mr. Tucker:

Thank you for your letter of Feb. 7. 1975, advising of the forthcoming determination of the Commission with respect to the staff opinions referred to above, which have been questioned by the Jewelers' Vigilance Committee, Inc. On behalf of our client, Metals and Jewels, we hereby submit to the Commission the following material for its consideration in determining whether the staff opinions in question were improper.

As a preliminary matter, we would like to address the statement contained in your letter of Feb. 7 to the effect that the use of the quality mark for which FTC staff approval was requested had previously been disapproved by the Jewelers' Vigilance Committee. One of the original inventors of the alloy, Seymour Globus, who is a principal in Metals and Jewels, did submit a sample of the alloy to Joel A. Windman, General Counsel of the Jewelers' Vigilance Committee on July 18, 1974. Mr. Windman responded, on July 25, 1974, that he had forwarded the sample for assay and that compliance with Commercial Standard CS51-35 would be required if the desired mark was to be employed. On Aug. 8, 1974, Mr. Windman reported to Mr. Globus the results of the assay, along with his analysis thereof, and concluded that the assay did not "definitively state that the product was not in fact originally made from 14K and sterling silver." Clearly, this conclusion does not amount to a "disapproval" by the Jewelers' Vigilance Committee. Copies of Mr. Windman's letters of July 25 and August 8 are attached hereto as exhibits. No further correspondence was received by our client from Mr. Windman and our client was not and is not aware of any formal action by the Committee approving or disapproving the use of the desired mark. Subsequent to Mr. Windman's correspondence as described above, he recommended orally that our client seek an opinion from the Federal Trade Commission concerning the use of the mark and expressed his willingness to abide by whatever decision was reached by the Commission. Partly as a result of this recommendation, the client has instructed our firm to submit a request to the Commission for an advisory opinion.

As you are aware, our initial request was submitted on Aug. 30, 1974, and in that request, a copy of which is attached as an exhibit hereto, the background of the matter is set forth, along with a brief discussion of the relevant Commission industry rules. Pursuant to our initial request, Barry R. Rubin, Esq., of the Office of General Counsel, issued an informal staff opinion, dated Sept. 9, 1974, approving the use of the quality mark "Alloy 1/2 14K + 1/2 Ster." in connection with the alloy. Shortly thereafter, our client granted to B. F. Hirsch, Inc. the right to produce the alloy for sale to jewelry manufacturers. At the request of B. F. Hirsch, Inc., on Sept. 18, 1974, we asked for a second opinion from Mr. Rubin approving the use of the quality mark "1/2 14K + 1/2 Ster." because the quality mark originally approved by Mr. Rubin had proved too lengthy for use by jewelry manufacturers. A copy of our second request is also attached as an exhibit hereto. On Oct. 11, 1974, Mr. Rubin issued an opinion approving the use of this second mark. Since the second request, the original applicant, Metals and Jewels, Inc., has been liquidated, and its assets, including all rights to the alloy and the pending U.S. Patent applications covering the alloy, are now held individually by Edward Kohrn, Seymour Globus and C. D. Kaufmann, trading as Metals and Jewels.

In reliance on the informal staff opinions, very substantial amounts of money have been invested in testing of the alloy for production, the manufacturing of sample jewelry lines using the alloy and the advertising and promotion of the sale of articles of jewelry manufactured from the alloy. Wholesale sales of articles made of the alloy have exceeded $2,500,000 to date. There is every indication that the alloy will be a tremendous success in providing a high quality, low cost substitute for the currently employed gold alloys from 10 to 14 karats. Obviously, this success would be a tremendous boon to the jewelry industry, which has been seeking such a high quality, low cost alternative ever since the price of gold began its sharp climb. However, the value of the alloy as a viable alternative to existing low karat gold alloys depends to a very large measure on the ability of jewelry manufacturers to employ a quality mark denoting that the alloy is a combination of precious metals. Accordingly, a decision by the Commission to withdraw the previously issued informal staff opinions would have serious adverse effects not only upon our client and the jewelry manufacturers and distributors who have invested heavily in the future of the alloy, but also upon the jewelry industry as a whole.

The legal question before the Commission is substantially identical to that posed in our initial request, that is, whether the use of the quality mark "1/2 14 K - 1/2 Ster." in connection with the alloy violates Sections 23.22, 23.23 or 23.25 of the rules adopted by the Commission as industry guides for the jewelry industry. 16 CFR §§ 23.22, 23.23, 23.25. These rules were initially adopted in 1957 to insure "the elimination and prevention of unfair trade practices to the end that the industry, the trade and the public may be protected from the harmful effects of unfair methods of competition, unfair or deceptive arts or practices, and other trade abuses." 22 F.R. 4567 (June 28, 1957). These rules, with a minor amendment in 1969, 24 F.R. 9581 (Dec. 1, 1959), have endured without substantial change since that time.

The first two rules, Sections 23.22 and 23.23, entitled "Misrepresentations as to gold content" and "Misrepresentations as to silver content," respectively, deal basically with markings or labels which may deceive the public as to the true character of articles made of gold and silver. The pertinent provisions of these rules attempt to deal with deception of two basic types. The first type of deception covered by these provisions is that caused by markings which misrepresent the extent of the presence of either gold or silver in the marked article. The applicable provisions addressing this first type of deception are as follows:

1. Section 23.22(a), which states the general rule that:

> (a) It is an unfair trade practice to sell or offer for sale any industry product under any trade or product name or designation or other representation having the capacity and tendency or effect of deceiving purchasers or prospective purchasers thereof as to the presence of gold or gold alloy in the product, or as to the quantity or fineness of gold alloy contained in the product, or as to the fineness, thickness, weight, ratio, or manner of application of any gold or gold alloy plating, covering, or coating on any industry product or part thereof.

2. Section 23.22(b)(2), which provides that one of the practices inhibited by the general declaration in 23.22(a) is:

> (2) Use of the word "Gold," or any abbreviation thereof, as descriptive of any industry product, or part thereof, which is composed throughout of an alloy of gold, unless a correct designation of the karat fineness of the alloy immediately precedes the word "Gold," or abbreviation thereof, and such fineness designation is of at least equal conspicuousness therewith.

3. Section 23.23(a), which parallels Section 23.22(a), with respect to misrepresentations as to silver content:

> (a) It is an unfair trade practice to misrepresent in any way the silver content or fineness of silver content of any industry product * * *.

Because the marking proposed with respect to our client's alloy accurately states the presence, content and fineness of both the gold and silver contained in the alloy, there can be little argument that the provisions of Sections 23.22 and 23.23 dealing with this first type of deception have been violated. It is undeniable that the proposed quality mark is not deceptive as to the primary metallic components of the alloy because the alloy is in fact composed of equal parts by weight of 14 karat gold and sterling silver.

The second type of deception at which Sections 23.22 and 23.23 are directed is not caused by inaccuracies or misrepresentations as to the degree of the presence of gold or silver in the article, but results from the possibility that the article marked "Gold" or "Sterling" may in fact be composed of a gold or silver alloy which, because of the excessive presence of base metals, does not possess the valuable properties associated in the public eye with the precious metal known as gold or sterling silver. The pertinent provisions of Sections 23.22 and 23.23 which address this second form of deception are:

1. Section 23.22(c) which provides that certain markings of products or parts of products will meet the applicable requirements. The pertinent marking is described in subsection (1):

> (1) An industry product or part thereof composed throughout of an alloy of gold *of not less than 10 karat fineness* may be marked and described as "Gold" when such word "Gold," wherever appearing, is immediately preceded by a correct designation of the karat fineness of the alloy and such karat designation is of equal conspicuousness as the word "Gold" * * *. (Emphasis added)

2. Section 23.23(b), provides a similar standard with respect to silver:

> (b) It is an unfair trade practice to mark, describe or otherwise represent any industry product, or part thereof, as "silver," "solid silver," "Sterling," or "Sterling Silver," unless it is at least 925/1,000ths pure silver.

These provisions reflect the judgment of the Commission and, presumably, the jewelry industry as a whole, as to the maximum proportion of base metals which can be alloyed with pure gold or pure silver without eroding the valuable properties of these precious metals. Their apparent objective is to prevent manufacturers of jewelry from marking as gold or silver an article composed of an alloy of one of those precious metals which, because of excessive dilution by base metals, does not possess the attributes publicly associated with the original precious metal.

It is significant that neither of the provisions addressing this second form of deception contemplates a situation such as the one at hand where two alloys, one clearly entitled under Section 23.22(c)(1) to the designation "Gold" and another properly the subject of the appellation "Sterling" under the standard of Section 23.23(b), are combined into a single alloy *which retains all of the valuable properties of a precious metal* and which, when properly labeled to accurately describe its metallic content in conformity with the provisions dealing with misrepresentations of fineness, etc., can work no such deception on the public. In spite of the absence of the second form of deception in the proposed marking of our client's alloy, if the language of either Section 23.22(c)(1) or Section 23.23(b) is independently and literally applied to the alloy resulting from this combination of precious metals, it can be concluded that the alloy can be labeled neither "Gold" nor "Sterling," because the end product is not, under the literal application of Section 23.22(c)(1), "an alloy of gold of not less than 10 Karat fineness," and because the final alloy is not, under a strict application of Section 23.23(b), "at least 925/1,000ths pure silver." The ironic consequence of such an independent application of the literal terms of these sections would be that an alloying of two component metals, each independently entitled to designation as precious metals under these sections, produces a product which cannot be designated either "gold" or "silver" and, as a result, cannot be marked to disclose its true character as an alloy of these two precious metals. Indeed, the effect of such an interpretation would be to deprive the public of any accurate description of the metallic components of the product and to *conceal* the valuable properties of the alloy, a result which certainly is not consistent with the underlying intent of the applicable rules.

The third pertinent section of the rules governing the jewelry industry, Section 23.25, sets forth certain additional requirements for the use of quality marks on articles composed of a precious metal or an alloy thereof. The pertinent language of this section appears in subsection (a)(1), which declares it an unfair trade practice to sell, distribute or offer for sale any industry product bearing a quality mark which because of its location, because of its failure to identify the portion of the product to which it is applicable, or for some other reason, "has the capacity and tendency or effect of deceiving purchasers as to the metallic composition of the product or any part thereof." This language emphasizes the purpose of the rules to protect the public from the first form of deception, that is, deceptive markings which do not accurately describe the components of the articles to which they are attached. As stated earlier, because the proposed marking for our client's alloy accurately describes the component metals used in the alloying process, it can have no deceptive public effect.

In summary, the three pertinent sections disclose two independent standards of public protection. The first standard, articulated in Section 23.25 and in Sections 23.22(a), 23.22(b)(2) and 23.23(a), is aimed to protect the public from markings which misrepresent the presence of precious metals. The second standard, embodied in Sections 23.22(c)(1) and 23.23(b) is directed to the use of a label or mark descriptive of the presence of a precious metal in articles which, because of the dilution of that precious metal by other base metals, do not possess the valuable qualities normally associated with that precious metal, regardless of whether the mark is accurate. The marking proposed by our client is not deceptive as to the metallic content of the alloy and clearly satisfies the first standard. In addition, because our client's alloy is a combination of two precious metals, it *retains the valuable properties of its component precious metals* and, therefore, does not deceive the public in the manner prohibited by the second standard. As pointed out earlier, however, the literal application of either section to the alloy could prevent the use of both "Gold" and "Sterling" as quality marks for articles composed of the alloy, since the language of those sections does not specifically consider alloys of *two* precious metals. Because the two basic standards of protection embodies in the rules are satisfied by the alloy and its proposed marking, denial of the proposed marking would not serve the underlying intent and purpose of the rules.

Accordingly, it is respectfully requested that the Commission interpret its rules in a manner consistent with their basic intent and with an awareness of the special qualities inherent in the alloy invented by our client. It is our conviction that this basic intent is satisfied by the special quality of the alloy and that the staff opinions issued to our client are consistent with such basic intent. We submit that the independent literal application of either Sections 23.22(a)(1) or 23.23(a) to a situation not contemplated by either such section will not serve the interest of the public or the jewelry industry as a whole and will have an extremely adverse effect upon our client and the other parties who have invested such significant amounts of time, effort and money in the development of the alloy. We respectfully request that the informal staff opinions issued to our clients be affirmed by the Commission.

If the Commission does not see fit to uphold the staff opinions issued to our client, we request that the Commission consider this letter as a petition for the promulgation of an amendment to the industry guide for the jewelry industry permitting the marking as a precious metal of articles manufactured from alloys, such as our client's alloy, which are made exclusively of component metals which, by themselves, would be entitled to marking as precious metals.

Sincerely yours,

s Howard B. Miller

/s/ John J. Ghingher, III

Jewelers Vigilance Committee, Inc. Second Letter of Inquiry

Nov. 18, 1974

Dear Secretary Tobin:

Enclosed please find a copy of our letter to you dated Nov. 11, 1974 regarding use of the stamping "1/2 14K Plus 1/2 Sterling." Since writing to you, I have been advised that an informal staff opinion was rendered by Barry R. Rubin, attorney in the Office of the General Counsel to the effect that the stamping "1/2 14K-1/2 Ster." would be permissible in his opinion. The copy of his opinion letter is also enclosed.

On July 27, 1973, the Jewelers Vigilance Committee received an informal opinion from Attorney, Joseph P. Dufresne, also in the Office of the General Counsel, which stated, in part, that quality stamping gold of less than 10K fineness would be prohibited and

> it would be inappropriate to submit a request for an advisory opinion to the Commission as to whether the description "6K" or "6Kt" might be used.

This conclusion was reached because he referred to the *Trade Practice Rules for the Jewelry Industry* and *Commercial Standards* and stated:

> Gold articles containing gold of less than 10K fineness may not bear a quality mark.

Also, he concluded that the Commission would not sanction use of descriptions such as "1/4 Gold" or "Quarter Gold."

Finally, we are also enclosing a copy of another opinion letter from Mr. Defresne also dated July 27, 1973 to Mr. Arthur Altman on use of designations "1/4 Gold" or "Quartergold." You will note in this letter, which is not as legible as the others, he has stated:

> * * * such designations would be offensive because they easily could give the impression that the item contains more gold than it, in fact, does. Purchasers have become "educated" to the numerical karat designations. What you propose in contrast, is a significant departure from what has been in use for many years. It is very questionable whether the quality of the item would measure up to the expectations the designations would generate.

In light of the above contrary informal staff opinions, two dated July 23, 1973 and one Oct. 11, 1974, our letter of Nov. 11 requesting the Commission review the matter of stamping something "1/2 14K Plus 1/2 Sterling" becomes all the more imperative. A four-billion dollar industry has now been placed in the uncertain position reflecting upon its stability which governed it, at least since the days of the Commercial Standards in the mid 1930's.

It should further be noted contrary to Mr. Rubin's opinion permitting the stamping abbreviation of the mark "ster.," the *Commercial Standards* dealing with markings of items containing jewelry, CS 118-34 states:

> The terms "sterling" and "coin" shall not be abbreviated. * * *

Finally, unless a decision concerning this marking is reached, fractional marking of gold and silver will become commonplace and the properties and qualities one expects from noble metals will, in turn, be affected.

Once again, I will make myself available to the Commission together with any experts which may be necessary for the Commission to seek a fair and equitable decision in the matter.

Sincerely,

/s/ Joel A. Windman
General Counsel

Jewelers Vigilance Committee, Inc. First Letter of Inquiry

Nov. 11, 1974

Charles Tobin
Secretary
Federal Trade Commission
Washington, D.C. 20580
Dear Secretary Tobin:

A firm by the name of Metals and Jewels, Inc. located at 1316-1318 W. Lexington St., Baltimore, Md. has a patent pending for a gold alloy comprised of 50 percent 14K gold and 50 percent sterling. They are now attempting to market this patent-pending alloy as "One-Half 14K Plus Sterling" to the trade.

They have initially asked us for our opinion whether or not a metal so composed would conform to the U. S. Department of Commerce Commercial Standard CS 51-35, "Marking Articles Made In Silver In Combination With Gold," a copy of which we enclose herein as well as with the Federal Trade Commission *Trade Practice Rules for the Jewelry Industry*, Rules 22 and 23 as well as the provisions of the *National Gold and Silver Marking Act*, 15 U.S.C., 29, *et. seq.*

We had a sample of this alloy assayed and found the gold content of the alloy to be a little over 7K and the silver to be 481.3 parts per thousand fine silver. Accordingly, we notified this firm that it was our belief that their alloy could not be stamped 14K gold and sterling in accordance with any of the aforesaid laws and/or rules.

The Commercial Standards dealing with combinations of silver and gold which they are referring to is subdivision 3(b). Please note, however, that subdivision 5(c) states:

> No quality mark indicating the presence of gold shall be applied to articles (made of sterling silver in combination with gold) composed in part of gold less than 10K fineness.

Further, Rule 22c(1) states that:

> An industry product or part thereof composed throughout of an alloy of gold of not less than 10K fineness may be described as "gold" * * *

Accordingly, although the alloy may have initially been composed of 14K gold, its "composition throughout" is only one-half of the required stamping and below the 10K minimum, and, therefore, allegedly in violation of the rule. Further, according to the *National Gold and Silver Marking Act*, the stamping would allegedly be a violation since its "actual fineness" is allegedly less than the tolerances provided for 14K gold.

Further, referring to the one-half "sterling," the Commercial Standards, paragraph 5(b) states:

> No article containing metal or metals other than sterling silver and gold * * * shall have applied to it the quality marks as proscribed in paragraph three and four herein.

Since the composition indicates the silver content to be 481 parts per thousand fine silver, it would allegedly not be "sterling" which is 925. Along these lines, Rule 23 of the Federal Trade Commission Rules states:

> It is an unfair trade practice to mark, describe, or otherwise represent an industry product or part thereof * * * "sterling" unless it is at least 925/1,000 pure silver.

Further, the prohibition of the *National Gold and Silver Marking Act* would allegedly apply here as well.

The Commercial Standard, as you will note from reading them, deal with articles combined with silver and gold applied to jewelry in which the parts were made of two separate metals either entirely sterling in one part and entirely of a karat gold above 10K in the other part, or to gold which was mechanically bonded to sterling (gold filled on sterling) or where white gold, a minimum of 1/20 of the weight was bonded to sterling, and the metals could not be easily distinguished. The framers of this Commercial Standard specifically use the words "silver *in combination* with gold," the word "combination" meaning the bringing together of articles already composed of sterling and karat gold of not less than 10K. It did not mean an "alloy" of silver and gold, for as the definitions state:

> (c) "gold" means 24 karats gold or any *alloy* of the element gold of not less than 10K fineness.
>
> (c) "sterling or "sterling silver" means an *alloy* of 925/1000 parts pure silver within the tolerances permitted by the National Stamping Act.

Thus, they are talking about a combination of metals already alloyed to their legal minimum and not an alloy of sterling and gold which would be a reduction from said legal minimum.

Further, the framers of the Commercial Standards specifically provided for alloys in Commercial Standard CS 67-38, "Marking Articles Made of Karat Gold," CS 118-44, "Marking of Jewelry and Novelties of Silver," CS 47-34, "Marking of Gold Filled and Rolled Gold

Plate Articles Other Than Watchcases," and CS 66-38, "Marking of Articles Made Wholly Or In Part of Platinum." Thus, it is believed that all alloys are adequately covered, namely, those providing for the minimum silver requirements of 925 and the minimum karat requirements of 10K in conformance with the *National Gold and Silver Marking Act.*

We had notified this firm, Metals and Jewels, Inc., of our conclusion and stated, since we believe promotion of the product would allegedly mislead, they should seek an advisory opinion from the Commission, since our findings would not necessarily be conclusive.

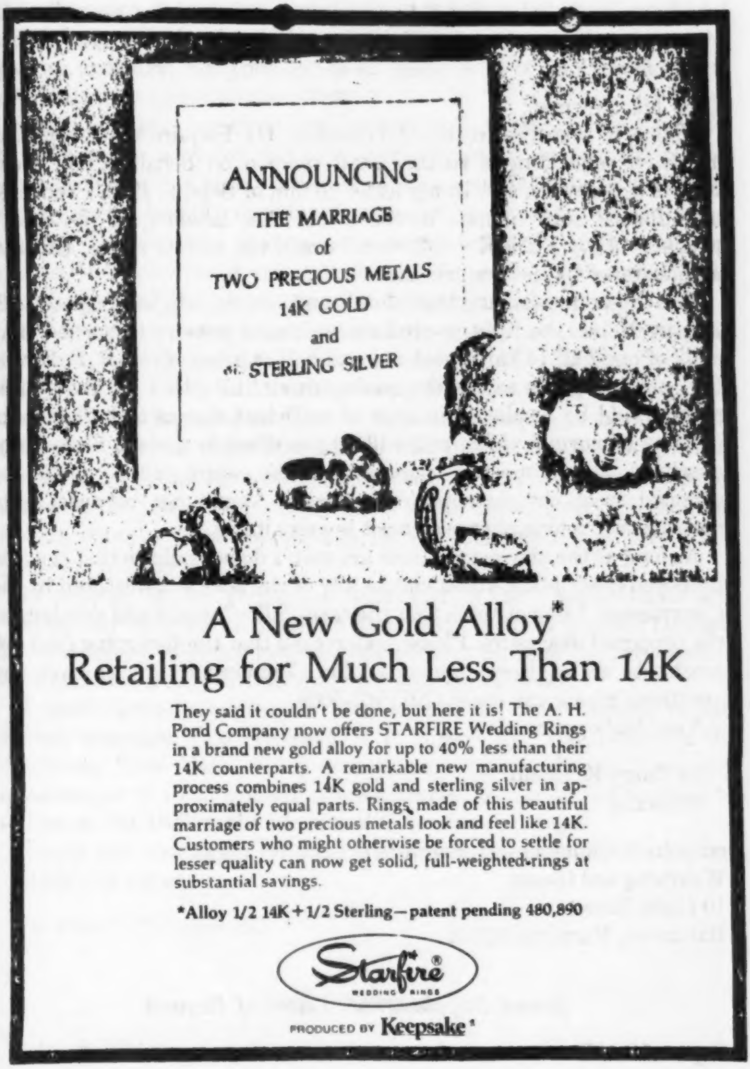
In the interim, we have found the firm is allegedly promoting its products to members of the trade and next month, in one of the trade publications, an alleged licensee will promote use of this mark. Enclosed is a photocopy of an advertisement that has appeared in the trade press, specifically the *Jewelers' Circular-Keystone* on page 105 in their November 1974 issue. To our knowledge, the product has not been sold.

Accordingly, it is imperative that the Commission review this matter to disseminate whether or not this marking would allegedly mislead the consumer who will ultimately be purchasing this product. Failure to do so at this time would lead others, for example, to allegedly manufacture alloys one-quarter silver, one-quarter 10K gold which would assay 2K and accordingly open a "Pandora's Box" to an industry which has attempted to live with Commercial Standards and within Rules and Guides promulgated by the Commission.

I will make myself available to the Commission together with any experts which may be necessary for the Commission to seek a fair and equitable decision on this matter.

Respectfully,

/s/ Joel A. Windman
General Counsel



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Staff Letter of Response

Oct. 11, 1974

Dear Mr. Newman:

This is in response to John J. Ghingher, III, Esquire's letter of Sept. 18, 1974, requesting a further staff opinion on behalf of his client, Metals and Jewels, Inc. In my letter to him of Sept. 9, 1974, I rendered an informal staff opinion to the effect that labelling of his client's product "Alloy 1/2 14K + 1/2 Ster." would not violate any of the laws administered by the Commission.

It is my understanding that Metals and Jewels, Inc. has granted to B. F. Hirsch, Inc. the right to produce articles of jewelry composed of an alloy of one-half 14 karat gold and one-half sterling silver. B. F. Hirsch, Inc., now proposes to use the quality mark "1/2 14K - 1/2 Ster." This mark would be displayed in type of sufficient size as to be legible to persons of normal vision and will be inscribed in a place likely to be observed by prospective purchasers. The word "alloy" would be dropped from the description because it would not be feasible to inscribe such a long phrase on most jewelry items.

As long as the above conditions are met, I do not believe that the new proposed description would violate any of the laws administered by the Commission. I do not think that the term "alloy" would add anything to the proposed disclosure. Please understand that the foregoing does not constitute an advisory opinion of the Commission. If you have any questions, please call me at (202) 963-5089.

Very truly yours,

/s/ Barry R. Rubin
Attorney

cc: John J. Ghingher, III, Esquire
Weinberg and Green
10 Light Street
Baltimore, Maryland 21202

Second Supplemental Letter of Request

Sept. 18, 1974

Dear Mr. Rubin:

Recently you were kind enough to provide us with an informal staff opinion with respect to the marking of articles of jewelry composed of an alloy of one-half 14 karat gold and one-half sterling silver. We had requested, on behalf of the above client, an opinion that the marking of this alloy with the quality mark "Alloy 1/2 14K + 1/2 Ster." would not violate any rule or regulation of the Commission applicable to the jewelry industry. By your letter of Sept. 9, 1974, you rendered an informal staff opinion to this effect.

Since that time, our client has granted to B. F. Hirsch, Inc. the right to produce the alloy for sale to manufacturers of jewelry. Hirsch has advised us that it is highly impractical for a manufacturer of jewelry to employ such a lengthy marking. Because of the small size of articles of jewelry, the marking that we had requested would impose severe restrictions upon the design possibilities for such articles and would therefore greatly restrict the marketability of the alloy.

For the above reasons, we request that you render a second informal staff opinion that use of the quality mark "1/2 14K - 1/2 Ster." will not violate any of the laws administered by the Commission. This quality mark will be displayed in type of sufficient size as to be legible to persons of normal vision and will be inscribed in a place likely to be observed by prospective purchasers. The mark is not currently being used and the use of the quality mark is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

In support of my request I refer you to the "Background" and "Discussion" sections of the letter dated Aug. 30, 1974 wherein Howard B. Miller and I submitted the original request on behalf of this client. I have enclosed a copy of that letter for your convenience.

I would greatly appreciate your addressing your opinion to Mr. Robert Newman, Vice President, B. F. Hirsch, Inc., 100 Avenue of the Americas, New York, N.Y., with a copy to me. If you have any questions or if I can provide any assistance, please do not hesitate to call me at 293-1807 on the District of Columbia exchange.

Thank you once again for your very kind cooperation in this matter.

Sincerely yours,

/s/ John J. Ghingher, III

Staff Opinion Letter

Sept. 9, 1974

Gentlemen:

This is in response to your letter of Aug. 30, 1974, requesting an advisory opinion from the Commission regarding the proper labelling of jewelry composed of an alloy of gold and silver. Since you requested that this matter be handled as expeditiously as possible, this letter is of necessity only an informal staff opinion and does not constitute an advisory opinion of the Commission.

It is my understanding that your client, Metals and Jewels, Inc., will market articles of jewelry composed of an alloy of one-half 14 karat gold and one-half sterling silver. These articles would have the same appearance as articles manufactured entirely of 14 karat gold. Your client proposes to imprint these articles with the following description: "Alloy 1/2 14 K + 1/2 Ster." This mark will be displayed in type of sufficient size as to be legible to persons of normal vision and will be inscribed in a place likely to be observed by prospective purchasers.

As long as the above conditions are met, I do not believe this description would violate any of the laws administered by the Commission. Please understand that the foregoing does not constitute an advisory opinion of the Commission. If you have any questions, please call me at (202) 963-5089.

Very truly yours,

/s/ Barry R. Rubin
Attorney
Office of General Counsel

Letter of Request

Aug. 30, 1974.

Dear Sir:

On behalf of Metals and Jewels, Inc., a District of Columbia corporation, I hereby request an advisory opinion with respect to the following proposed course of action:

Background

Edward L. Kohrn and Seymour Globus conceived an invention consisting of an alloy of 14 karat gold and sterling silver, combined in equal parts. Messrs. Kohrn and Globus have applied for letters patent covering their invention and have assigned such application, and any letters patent which may issue thereon, to Metals and Jewels, Inc. Metals and Jewels, Inc. proposes to produce and sell quantitities of the alloy for use in the manufacture of articles of jewelry. Custom and usage in the jewelry industry is such that in order to sell quantities of the alloy to jewelry manufacturers, Metals and Jewels, Inc. must provide said manufacturers with assurances that articles of jewelry composed of the alloy may be stamped with a quality mark indicating that such article is composed throughout of an alloy of precious metals.

Proposed Course of Action

It is proposed that articles of jewelry manufactured from the alloy described above and composed throughout of the alloy be imprinted with the quality mark "Alloy 1/2 14 K + 1/2 Ster." The quality mark will be of sufficient size type as to be legible to persons of normal vision and shall be so placed as likely to be observed by purchasers or prospective purchasers. There will be no difference in the size of letters or words within the quality mark.

Discussion

The general rules applicable to the proposed course of action are set forth in Title 16 of the Code of Federal Regulations particularly in Sections 23.22, 23.23 and 23.25 thereof. Those sections deal with misrepresentations as to the gold and silver content of an article of jewelry and the use of quality marks with respect to the composition of articles composed of precious metals and alloys thereof. It is submitted that use of the proposed quality mark will not misrepresent the gold content of the article of jewelry, will not misrepresent the silver content of said article and will not deceive purchasers or prospective purchasers of the article as to the metallic composition of the article. Attached is the report of Robert B. Pond, Jr., Ph.D., analyzing an assay of the alloy. Dr. Pond concludes that the assay is consistent with the description of the alloy as being composed of equal parts of 14 karat gold and sterling silver. Based on Dr. Pond's findings, use of the quality mark described above accurately represents the gold and silver content of the alloy and will not in any way deceive a purchaser of an article composed of the alloy as to the metallic composition thereof.

Request for Advisory Opinion

Metals and Jewels, Inc. hereby requests that the Commission issue an advisory opinion that the course of action proposed, on the basis of the facts submitted, will not violate any rule or regulation of the Commission applicable to the jewelry industry. The course of action is not currently being followed by the requesting party and is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

If any questions arise concerning this request for an advisory opinion, please call the undersigned at 293-1807 (on the District of Columbia exchange). A conference is respectfully requested if the Commission is considering an advisory opinion that the proposed course of action may not be implemented.

Sincerely yours,

/s/ Howard B. Miller

/s/ John J. Ghingher, III

Attachment to Letter of Request

Aug. 29, 1974

Dear Sirs:

I have examined the report which you furnished of a "Birmingham" assay of a metal alloy allegedly produced by mixing 14kt gold and sterling silver in equal parts by weight.

I intend to show that the assay confirms that the alloy sample contains gold and silver in quantities consistant with a mixture of 14kt gold and sterling silver in equal parts by weight.

1. Note that the original 14kt gold must have contained not less than 14/24ths. or 585/1000 parts gold by weight.

2. The original sterling silver alloy must have contained not less than 921/1000 parts silver by weight.

The weight fractions of gold and silver in a mixture of 14kt gold and sterling silver in equal parts by weight would be one half the original fractions. Therefore the final alloy must be composed of not less than

3. 1/2x585/1000 = 292.5/1000 parts gold by weight, and

4. 1/2x925/1000 = 462.5/1000 parts silver by weight.

The assay reported:

117.2mg gold
187.93mg silver
390.5mg total

The weight fraction of gold from the assay is

5. 117.2mg gold/390.5mg total = 300.1/1000 parts gold by weight.

This is greater than the minimum gold requirement of 292.5/1000(#3).

The weight fraction of silver from the assay is

6. 187.93mg silver/390.5mg total = 481.25/1000 parts silver by weight.

This is greater than the minimum silver requirement of 462.5/1000 (#4).

By these calculations it is evident that the final alloy can be described exactly as being produced by mixing one half 14kt gold and one half stirling silver by weight.

Respectfully submitted,

/s/ Robert B. Pond, Jr., Ph.D.

Possible conflict, as to notice requirements, between State law and FTC's Trade Regulation Rule Concerning A Cooling-Off Period for Door-to-Door Sales (16 C.F.R. 429) (File No. 753 7009)

Opinion Letter

May 20, 1975

Dear Mr. Feldman:

This is in response to your request for an advisory opinion regarding conflict, as to notice requirements, between State law and the Federal Trade Commission's Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales. The question posed is: Would printing of both the notice of the buyer's right to cancel a door-to-door transaction specified in the Commission's Rule and any such notice required by State statute or municipal ordinance, identifying one as the Rule and the other as State law, violate the Rule where the statute or ordinance involved prescribes a mandatory form of notice which in some respects may be incompatible with the form of notice prescribed by the Rule?

It is the Commission's understanding, based upon the information submitted, that you have requested the opinion for your own guidance and on behalf of the Major Finance Corporation, a company engaged in purchasing commercial paper from door-to-door sellers. Pursuant to your advice, the company proposes to require door-to-door selling companies from which it purchases commercial paper to include in contracts for transactions subject to the Commission's Rule both the notice of the buyer's right to cancel required by State law or municipal ordinance and the notice specified in the Commission's Rule, identifying one as the Rule and the other as State law.

The Commission has no objection to the inclusion in such contracts of both the notice required by State law or municipal ordinance and the summary notice specified in the Commission's Rule, identifying one as the Rule and the other as State law, as long as any language in the State or municipal notice directly inconsistent with the Rule is stricken. Since the Commission's rule gives the consumer a unilateral right to cancel a transaction within three days, without penalty or fee, language in a State notice misinforming the buyer of the existence of a penalty or fee (*i.e.*, "If you cancel, the seller may keep all or part of your cash down payment") is directly inconsistent with the Rule and, if included in the sales contract or receipt, must be stricken. Moreover, since the buyer's right to cancel transactions covered by the Rule is not limited to agreements solicited at or near the buyer's residence, does not require the buyer to furnish any reason for cancellation, and may be exercised by mail or delivery of any written notice or telegram, any language to the contrary in a state notice is similarly directly inconsistent with the Rule. Any other language in a state notice, the effect of which is to misrepresent in any manner the buyer's right to cancel under the Commission's Rule, must be omitted or stricken because directly inconsistent with the Rule. However, language in a State notice which informs buyers of State-created rights in addition to those conferred upon them by the Rule, or informs them how to be entitled to those rights, may be included in new contract or receipt forms, and retained in existing forms without being stricken.

Cognizant that providing both the summary notice required by the Rule and the notice required by State law could result in needless duplication in a contract, the Commission would not object to a seller using a composite notice containing elements of both the Rule's notice and the State notice, provided that the composite notice expressed no restrictions or limitations upon the buyer's right to cancel which are not contained in the Commission's Rule. A composite notice must also inform the buyer of a right to cancel at least as extensive as that described in the Commission's prescribed summary notice, including reference to the Notice of Cancellation form which must be attached to the contract.

By advising that it would not object to use of both the summary notice prescribed by the Rule and that required by State law, with inconsistent State language stricken, or to use of a composite notice, the Commission, of course, does not intend to raise the implication that sellers may not use only the form of summary notice prescribed by the Rule, where this would also satisfy State requirements. The Commission is aware of the difficulty imposed upon sellers who are subject to inconsistent State and Federal legal obligations. In the interest of national uniformity, the Commission continues to encourage the States to eliminate or change the requirements of their laws which are inconsistent with the Rule, to the extent that they provide less protection to consumers. The Commission also encourages those states with a specified form of notice expressing restrictions or limitations which are not contained in the Commission's Rule to consider use of contracts with only the notice prescribed by the Rule as satisfying State notice requirements, because it is the Commission's opinion, shared by numerous State and local officials who have consulted with the Commission, that the Rule's notice provides the buyer with the essential information concerning his or her unilateral right to cancel.

Whether the notice of the buyer's right to cancel prescribed by the

Rule is printed alone, in a composite form, or in addition to the state notice, the Rule's notice must be given in substantially the form specified and must comply with the minimum size and placement requirements of the Rule.

The Commission would consider it to be a violation of its Rule if a completed receipt or contract pertaining to a sale subject to the Rule contained only a state-required notice if that notice did not inform the consumer of his or her unilateral right to cancel a transaction within three days, without penalty or fee, and appropriately refer to the attached Notice of Cancellation form for an explanation of that right. With enactment of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, the Rule extends to door-to-door transactions, as defined in the Rule, in or affecting commerce.

The basis of the Commission's opinion is that trade regulation rules have the force and effect of law, and, like other substantive federal administrative regulations, preempt conflicting State law. The Commission's Cooling-Off Rule preempts State laws and municipal ordinances to the extent that they do not accord the buyer the same or greater right to cancel a door-to-door sale than that provided by the rule, as well as State-required notices to the extent that they do not provide notice of the right to cancel the transaction in substantially the same form and manner as the summary notice set forth in the rule. By including in a contract for a transaction covered by the rule a State-required notice of cancellation rights containing language directly inconsistent with the provisions of the rule, the buyer would be misinformed of his or her right to cancel under the rule and the full effectiveness of the rule would be frustrated.

The Commission emphasizes that the coordinated efforts of both the Commission and State and local officials are essential in providing the consumer with an effective right to cancel door-to-door transactions within a cooling-off period. The Commission's opinion that language in a State summary notice should be stricken if directly inconsistent with the provisions of the Commission's rule is not intended to annul or diminish any rights and remedies provided to consumers by State law and enforceable thereunder.

By direction of the Commission.

Letter of Request

June 3, 1974

Gentlemen:

This office represents Major Finance Corporation and its subsidiaries (the "Company"), a company engaged (among other lending and financing operations) in purchasing commercial paper from door-to-door sellers in the Washington, D.C. metropolitan area (including nearby Maryland and Virginia areas). This request for advisory opinion is made on behalf of the Company and for our own guidance in the light of the facts set forth below.

The facts. The Company requested our opinion concerning conflict of State (Virginia, Maryland and the District of Columbia) laws (the "statutes") with the Rule and methods of compliance with the Rule and the statutes. After studying the statutes and the Rule and discussions with state enforcement authorities, we advised our client as is set forth in a copy of our opinion letter, annexed hereto as Exhibit I.

On May 30, 1974, the undersigned received a telephone call from a member of your legal staff, Ms. Anne Fortney, who advised the undersigned that she had learned of our opinion and recommendations from a seller of commercial paper to the Company; that if the Company should adopt our recommendations to print, or require printing of, both the notice required by state statutes and the Rule, the F.T.C. would immediately bring suit against our client to require removal of statutory notices required by the States and for other unspecified violation(s) of the Rule, all on the ground that the addition of mandatory state notices would be contrary to the Rule, which she vehemently asserted supersede, annul and repeal all statutes in conflict therewith [notwithstanding the provisions of note 2(b) of the rule]. The undersigned informed Ms. Fortney that this office could not accept her opinion; that we were aware of possible changes in the statutes which would permit the use of only the notice required by the rule (which, in the case of Maryland, has occurred); and that until such time as such changes should occur, we believed we had no alternative but to advise our clients as set forth in Exhibit I hereto. Ms. Fortney again threatened action against our client and after a somewhat difficult conversation, the undersigned requested that he be transferred to your General Counsel's office. After discussion that day (May 30, 1974) and on June 3, 1974 with Mrs. Mary Foldes, who, incidentally, is more moderate and understanding in her approach to the problem and who has been both helpful and gracious, we have decided to request the Commission's opinion with respect to the conflict of laws problem which presently exists. We respectfully call your attention to the fact, adequately set forth in Exhibit I hereto, that the Company desires only to be in compliance with, and to have all sellers of commercial paper to it in compliance with, all applicable law. The Company does not desire to make test cases or become engaged in unnecessary litigation with the Commission or any State authority.

The basis of our opinion. We acknowledge that under present law and recent court decisions, rules of the Commission have the force and effect of law and must be complied with, where applicable. We do not acknowledge that a Commission rule can invalidate or repeal a State statute or a specific Act of Congress in its capacity as the legislative branch of the District of Columbia Government. State court (including in such term the District of Columbia) judges are obliged to enforce the laws of their respective jurisdictions (or in some cases, the jurisdiction wherein the transaction arose) and cannot simply defer to Federal rules, regulations or law unless the State law is unconstitutional or the matter involves interstate commerce, as to which the Federal law would generally be superior. It is impractical to think that in an area such as the Washington, D.C. metropolitan area, involving three jurisdictions, a door-to-door seller could make a proper decision as to the use of separate forms, one complying solely with Federal law (on the ground that Federal law is superior since interstate commerce is involved) and one complying solely with State statute (on the ground that the transaction is solely intra-State). Where a Commission rule and a state statute are in conflict with each other and both are applicable to our client, we see no alternative but to recommend compliance with both, which can be done in the instant situation, by simply not enforcing certain rights under State statutes, *e.g.*, retention of the deposit under the Maryland statute. We believe that this is the thrust and force of note 2(b) of the rule.

Request for opinion. Your opinion is respectfully requested as to the following matters:

Will *printing* of both the notice required by the rule and the notice required by statute (see Exhibit I recommendations as to the District of Columbia, Maryland being no longer a problem), identifying one as the rule and the other as State law, violate the provisions of the rule where the statutes involved prescribe a mandatory form of notice and that form of notice is incompatible with the form of notice prescribed by the rule?

We respectfully call to your attention our advice to our client to the effect that it is not to enforce provisions of State law which are less favorable to the consumer than the provisions of the rule, and vice versa if such situation should exist. Accordingly, the foregoing request is not to be interpreted as seeking an opinion which would permit the making of charges or use of other provisions of State law which are in conflict with the rule and less beneficial to the consumer; nor should it be interpreted as a request for permission to omit the notice of cancellation required by the rule, since we have advised our client to see to it that such notice of cancellation is provided in accordance with the rule.

Your early response will be appreciated. Pending such response, we have advised our client to follow our recommendation with respect to the District of Columbia and to follow the Rule only in both Virginia and Maryland.

Respectfully submitted,

FELDMAN & ECKER

/s/ Melville W. Feldman

Exhibit I - Attachment to Letter of Request

May 17, 1974

Dear Mr. Sturt:

At your request, we have reviewed the statutes of Maryland, Virginia and the District of Columbia for inconsistencies with the Rule, which becomes effective June 7, 1974. We are informed that you have copies of the Rule and all statutes to which reference is hereinafter made and accordingly, will not here set out each notice required by the Rule and each statute. We will, of course, furnish the same upon request.

The Facts

The Rule requires that a notice of the buyer's right of cancellation be printed in 10 point bold face type in immediate proximity to the space reserved in the contract for the signature of the buyer, as well as other requirements which we will not here repeat.

The Maryland Annotated Code, Article 83, Sections 28 through 35 (the "Home Solicitation Sales Act") covers, essentially, the same subject. Sections 30(2)(A) and (B) contain the form of notice of buyer's right to cancel required under Maryland law.

The Virginia Code, §§59.1-21.4, 59.1-21.5 and 59.1-21.6, essentially cover the same subject, buyer's right to cancel notice requirements being contained in §59.1-21.4(b).

The District of Columbia Code (1973 Edition), §28-3811, covers "home solicitation sales" in much the same manner as the Maryland law. Required buyer's right to cancel provisions are contained in §28-3811(g)(2).

Only the Rule prescribes the form of notice of cancellation which must be delivered to the buyer for his use in case of his desire to exercise his right of cancellation. Local statutes permit any form of notice of cancellation and do not require delivery of a form for such use.

The Notice of Right of Cancellation.

Virginia. There is no problem, either as to criminal penalty or civil penalty. §59.1-21.4(b)(ii) specifically provides that a notice given pursuant to federal law which contains at least the information prescribed by the notice specified in §59.1-21.4(b)(i) and which is not in conflict with the Virginia law may be used in lieu of the prescribed notice. We are of the opinion that the notice prescribed by the rule will satisfy the requirements of the Virginia Code inasmuch as the notice and notice of cancellation prescribed by the rule contain more information, are not inconsistent with, and are more protective of the buyer than the provisions of the Virginia Code. *Recommendation:* Use the notice suggested by the rule.

Maryland. The notice prescribed by the Maryland law (see reference above) is mandatory and explicit. The Maryland Attorney General's Office (Miss Stevans) has orally advised that the attorney general will request a change in the Maryland law which will adopt the requirements of the rule and that the attorney general will not seek to enforce any criminal penalties where there is compliance with the rule. This leaves two practical problems: (1) Since the attorney general's opinions are not binding upon the courts of Maryland or elsewhere, a court of Maryland might, upon complaint by a county attorney, impose the penalty of up to $500 prescribed by Section 33; and (2) in any suit to enforce a contract, a court (either in or out of Maryland) might find that there had not been compliance with Maryland law and that, therefore, the civil penalty of retention of the goods by the buyer [Section 31(4)] should be enforced. The "door-to-door" definition under Maryland law relates to sales made in the home, while the definition under the rule is much more broad. Accordingly, at this time we have no choice but to advise you that in our opinion you should comply with both the rule and Maryland law. *Recommendation:* You should print the notices required by both the Maryland statute and the rule, identifying one as "Maryland Law" and the other as "Federal Law." The only alternative would be to follow the requirements of the rule, risking the civil penalty of the Maryland law in cases where it might arise. We do not, in all candor, consider that, practically-not legally, there is any real risk of criminal penalty for failure to adhere to the exact notice requirements of the Maryland law, if the rule is followed. This basically entails a business risk decision as to the number of situations or cases in which the civil defense might be raised prior to amendment of the Maryland law-if and when amended.

District of Columbia. The notice required by the District of Columbia law (see reference above) is mandatory and explicit. It is similar, but not identical (*e.g.*, the notice requirements are slightly different) to the Maryland law and the basic principles of law are the same as we have set forth with respect to Maryland law. Mr. William Robinson, Chief of the Legislative Opinion Division of the Corporation Counsel's Office of the District of Columbia (similar to Attorney General's Office in Maryland) has orally advised that: his office has been requested to comment on the rule; his office is aware of the notice requirement inconsistency (*i.e.*, the rule is more broad than the D.C. notice requirement); no steps have been taken toward revision of the D.C. law; and, in *his* opinion the District of Columbia would not seek to enforce the D.C. law if there is compliance with the rule, notwithstanding that the D.C. law is enacted by the Congress of the United States and, as a general rule of law, would supercede and be superior to any regulation of a Federal agency (the F.T.C. in this case). Restating, the same principles as are applicable in Maryland, the Corporation Counsel of the District of Columbia does not make or judge the law; he is basically the prosecutor of criminal violations of the District of Columbia law. Judges decide the law and if the Corporation Counsel's office was pressed hard to file a complaint, the judicial decision might well be one with which that office was not in sympathy. Secondly, that office has no control over, or even jurisdiction to be a party to, the civil aspects of any case wherein the buyer might raise a defense or counterclaim based upon non-compliance with the D.C. law. It is very practical to think that the courts might, in these days of "consumer protection," take the strict legal view in order to relieve a buyer of his obligation to pay, finding non-compliance with the D.C. statute, which, as already stated, would normally be superior to the rule of a Federal agency. According, we have no choice but to state that in our opinion you should comply with both the D.C. statute and the rule. *Recommendation:* Print both notices, in the same manner as we have recommended for Maryland contracts. The same alternative is available to you, based upon your business judgment as to risk.

The Notice of Cancellation.

As hereinabove stated, only the rule prescribes the form of notice of cancellation which you must give to the buyer. By its terms, it is more broad and protective of the buyer than the law of Maryland, which, for example, allows a cancellation charge under certain conditions [Section 31(3)], and is in other respects more beneficial to the buyer than both the D.C. and Maryland laws. It is our opinion that you must, in order to comply with the rule, supply to the buyer a notice of cancellation in the form prescribed by the rule. Regrettably, unless you wish to argue, in each case which may arise, that the particular contract in question is not subject to the rule, but only to the state law (*i.e.*, Maryland, Virginia or the District of Columbia), you will be bound by the more broad protective aspects of the rule (*e.g.*, you will not be able to charge the fee allowed by Section 31(3) of Article 83 of the Maryland law). This could be the subject of a lengthy, legal discourse, but we do not consider it practical to review the whole subject of whether a particular contract is subject to the rule because it was or was not an interstate or intrastate transaction, or whether, regardless of that answer, the company (you) and/or the seller are so engaged in, or affect, interstate commerce as to require the application of the rule, etc., etc. As a practical matter, operating in this metropolitan area of three separate jurisdictions, we are of the opinion that the buyer will "have the best of all worlds;" namely the best advantages of both the rule and any other or additional advantage which he may find under local law.

General.

We are not unmindful of the practical problems created by the foregoing opinions and recommendations.

For example, we have sought a means by which we could recommend to you some sort of "combination" notice of buyer's right to cancel. In this connection, the rule is not as rigid as the laws of Maryland and the District of Columbia, permitting a statement "substantially" in the form suggested. Unfortunately, both the Maryland and the D.C. law do not permit "substantial" compliance and the prescribed forms would, in fact, limit or reduce the effect of the notice "suggested" by the rule. Conversely the notice required by the rule cannot be limited to a notice concerning sales "at your residence" (Maryland) or to sales made "at or near your residence" (D.C.), since the rule more broadly defines definitely those sales which are "door-to-door" sales.

We are also aware that the retail instalment contract used by you is already at its practical maximum paper length and that the rule prescribes that the notice of cancellation be "attached to the contract* * *and easily detachable." In this connection, we have contacted Mr. William Dixon of the F.T.C., who supposedly is knowledgeable concerning the rule. Frankly, he hedged, but he did state that the notice of cancellation could not be contained on a separate paper, attached by paper clip or staple. He did concede, however, that if multiple forms are used, it "*might*" be acceptable to so prepare the form that the copy delivered to the buyer would contain the notice of cancellation form, even though the same was not contained on the first page of the form. This would entail a somewhat unusual set of forms, so that you would be delivering to the buyer *three* copies of the contract (to comply with all statutory requirements) and the original would, in fact, be different from the other forms of the set. Frankly, we think this would be a poor practice, although possible, since the buyer's copies would be at variance with the original and could cause considerable dispute in the event of civil litigation. We have reviewed your forms and will be pleased to work with you to show you what can be done with the multiple form idea. However, based on a "guestimate," you will probably have less trouble and -uestion[sic] and probably not much more expense with forms which are supplied to the buyer (which under the rule must be in duplicate) containing the required notice of cancellation on a "tear off" perforated extension, which the form makers can probably fold in some manner so as to shorten the package. We will be pleased to work with you, by helping to design or reviewing any proposed forms. We do not think we can properly set out in this letter all of the necessary criteria for forms. In any event, we strongly urge that you keep your supply of new forms to a safe minimum, since it is likely that local jurisdictions and the F.T.C. will furnish us with better guidelines as the problems of compliance become better known and more acute.

We recognize that the foregoing does not satisfy your desire to comply with applicable law and the rule in a simple, straight-forward, manner. However, given the existing, very apparent, conflict of laws, we have had no choice but to make your task a bit more difficult than it really should be.

Sincerely yours,

/s/ Melville W. Feldman

Statistical reporting program on prices charged by members of a watchmakers association for various watch repairs. (File No. 753 7002)

Opinion Letter

May 22, 1975

Dear Mr. Neill:

This is in response to your letter of May 6, 1974 requesting an advisory opinion from the Commission concerning a proposed statistical reporting program.

It is the Commission's understanding that the Texas Watchmakers Association, Inc., an organization composed of twenty-one affiliated guilds, proposes to send each of its member watchmakers a copy of a survey questionnaire seeking an enumeration of retail charges for watch repairs and parts. Data from the survey responses would be collated and average, high, and low prices computed for each item. In addition, the data might be broken down to reflect prices charged in different areas of the State of Texas. These aggregate figures would then be published in a trade journal.

The Commission cannot give its approval to the proposed survey. In the Commission's view, the exchange of price data may lend itself to price fixing and may result in the elimination of price competition. For example, if the published data were presented or regarded as establishing a suggested or recommended price range, it is the opinion of the Commission that such a suggestion or recommendation would be likely to constitute a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

Although the survey questionnaire is designed to elicit price information which is current as of the time the form is completed, it is doubtful that prices for watch repair services are so volatile that the information could not be used to stabilize future price levels. Furthermore, the Association's acknowledgment that the published data might be broken down by areas within the State of Texas causes the Commission concern, since particular guilds may be made up of a relatively small number of watchmakers. When the number of sellers in a geographic market is not numerous, an exchange of current price information among them is highly suspect under the antitrust laws. *See United States* v. *Container Corp. of America*, 393 U.S. 333 (1969).

The Commission does not mean to suggest that it will withhold its approval of all proposed statistical reporting programs involving the collection of price information. The legality of such a program hinges on its purpose, implementation, and effects. However, where a request for an advisory opinion regarding such a program is not accompanied by a showing of a legitimate interest which warrants the collection of price data, the Commission will decline to approve the program. In the present case, the Association has failed to address the question of what useful, lawful purpose would be served by the collection and dissemination of data relating to retail watch repair charges. As the Supreme Court said in the *Container Corporation* case, *supra*, at 393 U.S. 338, "Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition."

By direction of the Commission.

Letter of Request

May 6, 1974

Gentlemen:

Please find enclosed a copy of the Texas Watchmakers Charter* along with a copy of a survey that we intend to mail to our members concerning the prices that they charge for watch repair.

It is our intent to gather this information and make it available through a trade journal and relate the average price, the high and low, and may break it down as to different areas of the State of Texas. Can we legally do this and not break any laws?

Thanks for your cooperation.

Yours truly,

/s/ Harold B. Neill
President

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* For the reason that the copy furnished the compilers of this publication was illegible, as well as economy reasons, the charter is not reproduced here. However, it is available for inspection and copying at the Division of Legal & Public Records, Federal Trade Commission Building, Washington, D.C.

TEXAS WATCHMAKERS ASSOCIATION, INC.
1974

**RETAIL WATCH REPAIR CHARGES. IF YOU DO NOT SERVICE AND/OR REPAIR SOME TYPES OF WATCHES LISTED; PLEASE LEAVE BLANK.
THE SIGNING OF THIS SURVEY IS OPTIONAL.
RETURN IN ENCLOSED ENVELOPE.**

Number I. through V. should be considered to have water-resistant cases.

I. Regular stem-wind . . . $______
Date . . . . ______
Date-Day . . . . . ______
Alarm . . . . ______

II. Automatic . . . . $______
Date . . . . ______
Date-Day . . . . . ______
Alarm . . . . ______
Date-Day Alarm ______

III. Regular Electronic . . . $______
Date . . . . ______
Date-Day . . . . . ______

IV. Regular Electric . . . . . $______
Date . . . . ______
Date-Day . . . . . ______

V. Regular Accutron . . . $______
Date . . . . ______
Date-Day . . . . . ______
Phasing only . . ______

VI. Pocket; R.R. Quality . $______

VII. Chronograph, 30 min. $______
30 min. & hour . . ______
Automatic . . . . ______
Day-Date . . . . ______

VIII. Antique-lever . . . . . . $______
Cylinder . . . . ______
Duplex . . . . ______
Fusee . . . . ______

IX. High Grade Watches such as:
Patek-Phillipe, Vacheror Constantine, & Audumars Piquet . . . . $______

X. Timer-stop watch 7 J . $______

XI. Install cell & check rate
Accutron . . . . $______
Electric . . . . ______
Timex . . . . ______
Electronic . . . ______

A = parts only, no other services rendered.
B = parts with complete service to watch.

	A	B
Regular stem	$______	$______
2-piece stem	______	______
Dress crown	______	______
Dust Proof Crown	______	______
Water-resistant crown	______	______
Skin-diver crown	______	______
Regular stem and dress crown	______	______
Regular stem and water-resistant crown	______	______
Regular stem and Dustproof crown	______	______
2-piece stem and water-resistant crown	______	______
Skin-diver crown and regular stem	______	______
Skin-diver crown and 2-piece stem	______	______
Balance staff	______	______
Mainspring	______	______
Dial refinishing, cost plus	______	______
Setting bridge	______	______
Detent	______	______
Winding pinion	______	______
Clutch	______	______
Clutch lever	______	______
Clutch lever springs	______	______
Train wheels, cost plus what %	______	______
Other parts that do not require special fitting, cost of part plus what %	______	______
Crystal, water-res.	______	______
Crystal w/ring	______	______
Crystal, glass	______	______
Crystal, fancy GS & SUC, & ETC.	______	______

GUARANTEE: **I give a guarantee of ____ months on complete repair jobs.**

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Possible conflict, as to notice requirements, between State law and FTC's Trade Regulation Rule Concerning A Cooling-Off Period for Door-to-Door Sales. (16 C.F.R. 429)	(753 7009)	1215
Statistical reporting program on prices charged by members of a watchmakers association for various watch repairs.	(753 7002)	1224